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No. ___

IN THE

Supreme Court of the United States

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION; ANNE W. MURPHY, in her official capacity as Secretary of the Indiana Family and Social Services Administration; GINA ECKART, in her official capacity as Director of the Division of Mental Health and Addiction; LARRY LISAK, in his official capacity as Superintendent of Larue Carter Memorial Hospital,

Petitioners,

v.

INDIANA PROTECTION AND ADVOCACY SERVICES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the limited abrogation of state sovereign immunity permitted by *Ex parte Young* extends to intramural conflicts in which one state agency sues another state agency in federal court.

2. Whether the PAIMI Act, a federal grant program enacted pursuant to Congress's Spending Clause power, implicitly provides protection and advocacy systems with a right of action to enforce its directives.

3. Whether the Department of Health and Human Services has reasonably excluded peer review reports and related documents made confidential by state law from the definition of "records" that must be disclosed to protection and advocacy systems under the PAIMI Act.

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PETITION FOR A WRIT OF CERTIORARI

Defendants Anne W. Murphy, Gina Eckart, and Larry Lisak, all in their official capacities (hereinafter "the state officials"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The en banc opinion of the Seventh Circuit is reported as *Indiana Protection and Advocacy Services v. Indiana Family and Social Services Administration*, 603 F.3d 365 (7th Cir. 2010), and is reprinted in the appendix at 1a. The Seventh Circuit panel decision is reported as *Indiana Protection and Advocacy Services v. Indiana Family and Social Services Administration*, 573 F.3d 548 (7th Cir. 2010), and is reprinted in the appendix at 74a. The decision of the district court is unreported and is reprinted in the appendix at 84a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered final judgment on April 22, 2010. This Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the

United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

The relevant portions of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001 *et seq.*, and the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801 *et seq.* are set forth in the appendix at 106a.

STATEMENT

This case is about preserving the integrity of a state's sovereign immunity by refusing to allow a state to sue itself in federal court. The Court should grant review for three reasons. First, in holding that the *Ex parte Young* exception to sovereign immunity applied in this case, the Seventh Circuit radically expanded that doctrine and created a clear conflict with a recent Fourth Circuit case in which the Court has already granted review, *Virginia v. Reinhard*, 568 F.3d 110 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3737 (U.S. June 22, 2010) (No. 09-529). Second, the Seventh Circuit holding that the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801 *et seq.*, creates a federal cause of action contravenes *Gonzaga University v. Doe*, 536 U.S. 273 (2002), and other recent pronouncements of this court. Third, the decision below regarding peer review documents

conflicts with both a Health and Human Services regulation and a state supreme court decision.

Statutory Background

The Developmental Disabilities Assistance and Bill of Rights Act ("DDA Act") was enacted to ensure that individuals with disabilities have access to needed services and supports. *See* 42 U.S.C. § 15001(b). To that end, the Act authorizes programs including state councils on development disabilities, 42 U.S.C. § 15001(b)(1), protection and advocacy systems, 42 U.S.C. § 15001(b)(2), and university centers for excellence in developmental disabilities education, research, and service, 42 U.S.C. § 15001(b)(3). Of particular relevance here, the DDA Act conditions funding for state councils on developmental disabilities on whether the state also has a compliant "system to protect and advocate the rights of individuals with developmental disabilities." 42 U.S.C. § 15043 (a).

The Protection and Advocacy for Individuals with Mental Illnesses Act ("PAIMI"),[1] 42 U.S.C. §§ 10801 to 10851, provides funding for protection and advocacy systems ("P&A systems") established under the DDA Act and expands the mission of the DDA Act to encompass the provision of services to the mentally ill. PAIMI provides that a compliant P&A

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[1] This statute was originally known as the "Protection and Advocacy for Mentally Ill Individuals Act of 1986," but a 1991 amendment substituted "individuals with mental illness" for "mentally ill individuals" wherever appearing in text. 1991 Amendments Subsec. (a). Pub.L. 102-173, § 10(2). Thus, the statute is now known as the "Protection and Advocacy for Individuals with Mental Illness Act" or PAIMI Act.

system "shall . . . investigate incidents of abuse and neglect of individuals with mental illness." App. at 111a; 42 U.S.C. § 10805(a)(1)(A). In order to carry out these investigations, P&A systems "shall . . . have access to all records of . . . any individual who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access[.]" App. at 112a; 42 U.S.C. § 10805(a)(4)(A).

States may choose to create P&A systems either as state agencies or as private, nonprofit entities. *See* 42 U.S.C. §§ 15044(a), 10805(c)(1)(B); 45 C.F.R. § 1386.20. Indiana chose to establish its system as a state agency, creating Indiana Protection and Advocacy Services ("IPAS") in 1977 for the purpose of "assur[ing] adequate legal and advocacy services for the[] promotion[,] protection[,] and advocacy[] of the rights and interests of individuals with a developmental disability, individuals with a mental illness, and individuals who are seeking or receiving vocational rehabilitation services throughout Indiana." Ind. Code §§ 12-28-1-6, -11.

The IPAS Commission consists of thirteen members, four of whom are appointed by the Governor and nine of whom are appointed by a majority vote of the Commission members. Ind. Code § 12-28-1-6(a)(1)-(2). One member of the Senate, appointed by the President Pro Tempore of the Senate, and one member of the House of Representatives, appointed by the Speaker of the House of Representatives, serve in an advisory, non-

voting capacity to the Commission. Ind. Code § 12-28-1-6(c). The Commission bears ultimate responsibility for IPAS's provision of protection and advocacy services, and it appoints—and may remove at any time—the agency's executive director. Ind. Code § 12-28-1-10.

The Commission is subject to the Indiana State Personnel Act, and may appoint, fix the compensation for, and prescribe the duties of any attorneys or other employees the Commission considers necessary. Ind. Code § 12-28-1-12(2). The Commission provides legal and advocacy services throughout Indiana on matters related to the protection of the legal and human rights of individuals with developmental disabilities, individuals with mental illnesses, and individuals who are seeking or receiving vocational rehabilitation services, and may adopt rules pursuant to Indiana's Administrative Rules and Procedures Act. Ind. Code § 12-28-1-12(7).

Factual Background

In 2006, as part of an investigation, IPAS requested from Larue Carter Memorial Hospital ("Larue Carter"), a state-operated psychiatric hospital in Indianapolis, records pertaining to two of its patients, who have been anonymously labeled throughout this litigation as Patient 1 and Patient 2. App. at 84a-91a. Records identified by Larue Carter pertaining to Patient 2 have been disclosed to IPAS and are no longer the subject of litigation. App. at

6a-7a. The records that remain in contention relate to Patient 1. App. at 6a.

Patient 1 was admitted to Larue Carter on June 21, 2006. App. at 6a. Six days later, on June 27, 2006, Patient 1 was transferred to Wishard Memorial Hospital, where she died on July 31, 2006. *Id.* A Mortality Review Committee convened at Larue Carter on August 11, 2006, and completed its report on August 28, 2006. *Id.*

On August 30, 2006, Peggy Owens, an advocate at IPAS, reviewed Patient 1's chart onsite at Larue Carter. App. at 89a. After reviewing the chart, Owens requested by letter a copy of Patient 1's complete chart. *Id.* In response to this request, Kathy Gregory, Deputy Chief Counsel of the Indiana Family and Social Services Agency ("FSSA"), State Division of Mental Health and Addiction (which oversees Larue Carter), notified Owens in writing that the hospital could not release the records to IPAS because Patient 1 had parents who had been active in the case, but who had not signed a release of the medical record as next of kin. App. at 89a-90a. On September 13, 2006, Owens requested by letter a copy of the mortality review committee report and the root cause analysis report—the latter also a product of the Mortality Review Committee—that were prepared after Patient 1's death. App. at 90a. On behalf of Larue Carter and the defendant state officials, Gregory refused to release any such reports. *Id.*

Proceedings Below

IPAS filed this lawsuit on December 22, 2006, naming as defendants the administrator of Larue Carter and the Indiana Family and Social Services Administration, along with the FSSA Secretary and the Director of FSSA's Division of Mental Health and Addiction. Compl. at 1, S.D. Ind. Docket No. 1, No. 1:06-cv-1816 (Dec. 26, 2006). IPAS sought "injunctive and declaratory relief pursuant to 42 U.S.C. § 10807 to prevent [the state officials] from restricting full, complete, and meaningful access by Indiana Protection and Advocacy Services to the records of individuals with mental illness from Larue Carter Memorial Hospital." *Id.*

In its complaint, IPAS claimed that the state officials' refusal to provide the requested records violated Section 10805 of PAIMI, *id.* at 1-3, which provides that a P&A system "shall . . . have access to all records of . . . any individual who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access." App. at 112a; 42 U.S.C. § 10805(a)(4)(A).

On July 28, 2008, the district court entered an order granting summary judgment in favor of IPAS. App. 84a-105a. The court held that "IPAS is entitled to all records in Defendants' [the state officials'] possession, including any peer review committee reports or root cause analyses that were done regarding [Patient] 1." App. at 104a. The district court, however, stayed its injunction pending appeal.

Order Granting Motion to Stay Pending Appeal at 1, S.D. Ind. Docket No. 71, No. 1:06-cv-1816 (Sept. 3, 2008).

At oral argument on appeal, a panel of the Seventh Circuit expressed an interest in a number of underlying issues related to federal jurisdiction, none of which had been covered in the parties' briefs, including whether sovereign immunity barred this action and whether IPAS had a cause of action to enforce PAIMI in federal court. The panel invited supplemental briefing on these issues. Order: The Court Invites the Parties to File Supplemental Briefs Addressing the Questions Addressed in the Order at 1-2, 7th Cir. Docket No. 18, No. 08-3183 (Jan. 26, 2009).

After reviewing the supplemental briefs, the panel issued its opinion vacating the district court's decision and remanding the case with instructions to dismiss for lack of jurisdiction. App. at 74a-83a. Specifically, the panel held that because IPAS is a state agency, it is barred by the Eleventh Amendment from suing FSSA, another state agency. App. at 80a-82a. Additionally, the panel found that PAIMI did not create a cause of action. App. at 79a ("[IPAS] contends that the claim arises directly under federal law—§§ 10805 and 10806. This does not help, because those sections lack a right of action.").

IPAS petitioned for rehearing *en banc* and, on November 10, 2009, the Seventh Circuit granted IPAS's petition and vacated the panel's opinion and

judgment. App. at 72a-73a. The Court ordered the parties to brief the case anew. *Id.*

Meanwhile, the state officials determined that it would no longer resist IPAS's request for documents related to Patient 2 or IPAS's request for Patient 1's complete medical file. App. at 6a-7a. The state officials turned those documents over to IPAS on January 28 2010.[2] The resolution of the dispute over those documents has left the disagreement over whether peer review documents are disclosable under PAIMI as the only merits-related dispute in the case, although procedural issues related to sovereign immunity and cause of action remain front and center.

On April 22, 2010, the en banc Seventh Circuit issued its judgment in this case in favor of IPAS. App. at 1a-63a. The court, however, modified the judgment of the district court to provide that the declaratory and injunctive relief ran only against the named state officials in their official capacities, not against the state itself or any state agency. App. at 37a.

On May 5, 2010, the state officials filed a Motion to Stay the Mandate with the Seventh Circuit, which denied the request on May 26, 2010. App. at 65a-

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[2] These disclosures notwithstanding, IPAS has contended that the state officials should have additional documents related to Patient 2 that the state officials have not turned over. The state officials have turned over all they have found and have continued searching for additional documents responsive to IPAS's request concerning Patient 2.

71a. The mandate issued on May 27, 2010. Mandate at 1, 7th Cir. Docket No. 73, No. 08-3183 (Jan. 26, 2009). The state officials filed an Application for Immediate Recall and Stay of Mandate with Justice Stevens in his capacity as Circuit Justice on May 27, 2010, but that was denied on June 1, 2010. App. at 64a. The state officials turned the peer review documents over to IPAS on June 2, 2010, but reserved the right to take them back if it should prevail in this Court.

REASONS FOR GRANTING THE PETITION

The Court should grant plenary review on all three issues presented, but at the very least it should hold the case pending resolution of *Virginia v. Reinhard*, 568 F.3d 110 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3737 (U.S. June 22, 2010) (No. 09-529). *Reinhard* presents the exact same sovereign immunity issue as this case, so the result there will be dispositive on that issue here.

The second issue asks the Court to review whether PAIMI creates a right of action enabling IPAS (and other P&A systems) to enforce the Act. On this issue certiorari is warranted because the Seventh Circuit's holding contravenes the tenets set forth in *Gonzaga University v. Doe*, 536 U.S. 273, 283-84 (2002), by finding an implied right of action in a federal grant program that instructs how grant money is to be used but does not create enforceable rights.

Finally, the Court should grant review on issue three because the decision below conflicts with the

Department of Health and Human Service's reasonable decision to exclude peer review reports and related records made confidential by state law from the definition of "records" under PAIMI. As the New Hampshire Supreme Court observed, reading PAIMI to preempt State laws protecting the confidentiality of peer review records "would create a result contrary to the basic congressional purpose that underlies PAIMI . . . ." *Disabilities Rights Ctr., Inc. v. Comm'r, New Hampshire Dep't of Corrections*, 732 A.2d 1021, 1024 (N.H. 1999) (holding that PAIMI does not preempt state peer review privileges). The Seventh Circuit's decision invalidates an HHS regulation, creates a conflict with the Supreme Court of New Hampshire, and stands in tension with the basic congressional purpose that underlies PAIMI.

I. As the Court is Already Reviewing the Sovereign Immunity Issue, It Should Either Grant Plenary Review Here or Hold the Case Pending Decision in *Reinhard*

On the sovereign immunity issue, the Seventh Circuit's decision creates a clear circuit conflict and represents an unprecedented expansion of the *Ex parte Young* doctrine, 209 U.S. 123 (1908), which has historically stood for a carefully circumscribed exception to the Eleventh Amendment's guarantee of state sovereign immunity. Because the decision below directly conflicts with the Fourth Circuit's decision in *Virginia v. Reinhard*, 568 F.3d 110 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3737 (U.S. June 22, 2010) (No. 09-529), the Court should either

grant plenary review here or hold this case pending resolution of *Reinhard*.

To recap the issue, in this case Indiana's state-agency P&A system sued three Indiana officials (and their state agencies) claiming unlawful denial of access to records in violation of the DDA and PAIMI Acts. The Seventh Circuit found that IPAS's suit was a "classic application of *Ex parte Young* . . . ." App. at 18a. In *Reinhard*, Virginia's state-agency P&A system sued three Virginia officials claiming unlawful denial of access to records in violation of the DDA Act and PAIMI. The Fourth Circuit held that the P&A system was barred by the Eleventh Amendment and principles of sovereign immunity from suing officials of the same state—and that it could not invoke the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to circumvent this jurisdictional bar. *Reinhard*, 568 F.3d at 124-25.

The Fourth Circuit, recognizing that *Ex parte Young* has always been a limited exception, stated that "allowing a state's officials to be called before a federal court by one of the state's own agencies, without notice or consent, cannot be reconciled with the separate sovereignty of the states." *Reinhard*, 568 F.3d at 124. Further, "expanding *Ex parte Young* to permit a suit in these circumstances cannot be reconciled with the 'real limitation[s]' of the doctrine of sovereign immunity." *Id.* at 125 (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997)).

The Seventh Circuit came to the opposite conclusion. While the Seventh Circuit recognized that IPAS is a state agency, App. at 13a ("IPAS is technically a state agency . . . ."), it deemed reliance on that fact to be "frankly[] unfair." App. at 16a. Even though Congress gave states the choice of setting up their P&A systems as either independent state agencies or private non-profit corporations, the Seventh Circuit held that treating independent state agencies differently from private non-profit corporations would produce results that are "strange indeed." *Id.* Where the Fourth Circuit deemed this kind of state-agency-versus-state-agency conflict to be nearly irreconcilable with the "real limitation" of sovereign immunity, *Reinhard*, 568 F.3d at 125, the Seventh Circuit's "straightforward inquiry" found that sovereign immunity posed no bar to this suit. App. at 12a.

Review is therefore warranted in this case, just as in *Reinhard*, to resolve whether "special sovereignty interests" of states preclude the exercise of federal jurisdiction when a state agency sues another agency of the same state. At the very least, the Court should hold this case pending resolution of *Reinhard*.

II. The Seventh Circuit Holding that PAIMI Creates a Federal Cause of Action Contravenes *Gonzaga* and Other Recent Pronouncements of This Court

The Seventh Circuit held that PAIMI created a cause of action despite the fact that PAIMI is a

spending powers statute and contains no explicit language creating a cause of action. This holding represents a misreading of *Gonzaga University v. Doe*, 536 U.S. 273 (2002), particularly in light of this Court's summary decision in *Brunner v. Ohio Republican Party*, 129 S.Ct. 5 (2008) (per curiam).

As a spending powers statute, PAIMI is merely an offer of federal funds to states that wish to complete certain tasks. It does not create federal rights enforceable by a cause of action against states for failing to complete those tasks. PAIMI provides funds to states that choose to create compliant P&A systems and participate in the program, *see* App. at 110a-111a; 42 U.S.C. § 10803, and provides for the termination of funding to noncompliant systems, *see* 42 C.F.R. § 51.10. PAIMI grants HHS, not P&A systems, a remedy for statutory violations.

1. This Court has said that federal statutes do not create causes of action by implication. *See Gonzaga*, 536 U.S. at 283-84. Whether Congress intended to create a cause of action "'is definitively answered in the negative' where 'a statute by its terms grants no private rights to any identifiable class.'" *Id.* (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979)). Even where a statute grants a private right to an identifiable class, putative plaintiffs must also demonstrate that "the statute Congress has passed . . . displays an intent to create not just a private right but also a private remedy," *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), and that they "may judicially enforce the statutory rights or obligations," *Davis v. Passman*, 442 U.S. 228, 239 (1979).

The Court's recent precedents set forth standards that make clear that PAIMI does not create judicially enforceable federal rights for P&A systems. *Sandoval* rejected an implied right of action to enforce federal disparate-impact regulations promulgated by the Department of Justice under Title VI of the Civil Rights Act of 1964 on the grounds that they were phrased in terms of instructions to federal funding agencies, not in terms of rights. *Sandoval*, 532 U.S. at 278-79. A year later, this Court in *Gonzaga* rejected an implied right of action to enforce the Family Educational Rights and Privacy Act of 1974 (FERPA),[3] which prohibits federal funding for educational institutions that release student records to unauthorized persons. *Gonzaga*, 536 U.S. at 276. FERPA did not create a private right of action, the Court held, because it was enacted under Congress' spending powers and the Court had "never before held, and decline[d] to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights." *Id.* at 279.

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[3] The FERPA lawsuit was actually pled under 42 U.S.C. § 1983, but "the initial inquiry—determining whether a statute confers any right at all—is no different [in a § 1983 case] from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute 'confer[s] rights on a particular class of persons.' . . . A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context." *Gonzaga*, 536 U.S. 273, 285 (internal citations omitted).

This Court specifically rejected the assertion that a federal statute confers a judicially enforceable right where Congress intended individuals to "benefit" from the statute. *Id.* at 282. The Court required instead an "unambiguously conferred right" to support a cause of action, which FERPA did not provide. *Id.* at 283.

In his concurrence, Justice Breyer restated the factors courts should consider in deciding whether a federal statute creates a right of action, including, 1) "[t]he phrasing of the relevant prohibition"; 2) "the total absence (in the relevant statutory provision) of any reference to individual 'rights' or the like"; 3) "the related provisions that make clear, by creating administrative enforcement processes, that the Spending Clause was not simply a device to obtain federal jurisdiction"; and 4) "later statutory insistence upon centralized federal enforcement at the national, not the regional level . . . ." *Gonzaga*, 536 U.S. 291-92 (Breyer, J., concurring). Justice Breyer added that "[m]uch of the statute's key language is broad and nonspecific" and thus created ambiguity in key statutory terms, which only underscored the difficulty associated with affording an implied right of action. *Id.* at 292.

Thus, only unambiguous Congressional intent can create judicially enforceable rights. This Court does not allow beneficiaries of federally funded programs dissatisfied with implementation—much less state government agencies receiving program grants—to turn benefits into rights enforceable by suit in federal court.

2. The Court confirmed this understanding of *Gonzaga* in *Brunner v. Ohio Republican Party*, 129 S.Ct. 5 (2008) (per curiam), when it held that the Ohio Republican Party was not "sufficiently likely to prevail on the question of whether Congress has authorized the District Court to enforce Section 303 [of the Help America Vote Act (HAVA)] in an action brought by a private litigant to justify the issuance of a TRO." *Brunner*, 129 S.Ct. at 6. To understand the significance of this decision for the right-of-action issues in this case, it is important to revisit the details of how the lower courts handled *Brunner*.

The Sixth Circuit, in its vacated en banc decision, found a private cause of action to enforce provisions of HAVA, holding that "the fact that *all* of HAVA's relevant provisions may be enforced by the United States Attorney General or through administrative processes at the state level suggests that all mandates should be privately enforceable or none should be." *Ohio Republican Party v. Brunner*, 544 F.3d 711, 720 (2008) (internal citation omitted), *vacated*, 129 S.Ct. 5 (2008) (per curiam). Providing for administrative processes at the state level or for enforcement by the United States Attorney General, however, is not the type of language that creates an "unambiguously conferred right." *Brunner*, 544 F.3d at 726-27 (Moore, J., dissenting) ("However, these provisions of HAVA regulate the conduct of *officials* involved in the voting process; they do not create rights enforceable by individual voters.")

As Judge Moore observed in her dissent to that opinion, *Gonzaga* requires an unambiguous intent on the part of Congress to create a right. *Brunner*, 544 F.3d at 726-27 (Moore, J., dissenting). Analyzing the factors Justice Breyer laid out in his concurrence in *Gonzaga*, Judge Moore explained that the relevant provisions of HAVA 1) regulate the conduct of officials; 2) do not contain rights-creating language but instead impose obligations on state officials; 3) provide mechanisms for their own enforcement; and 4) specify that the United States Attorney General can bring an enforcement suit. *Id.* at 726-30 (Moore, J., dissenting). Those factors demonstrate that Congress did not intend to create a private cause of action in the disputed provisions of HAVA—or, by parity of reasoning, in other enactments having similar features.

When this Court vacated the TRO granted by the Sixth Circuit in *Brunner* because of an insufficient likelihood of success on the merits, it was rejecting the Sixth Circuit's understanding that state-level administrative processes imply rights of action to enforce a federal program. In short, federal programs that award grants that happen to create downstream benefits do not as such create rights in downstream beneficiaries to enforce the conditions attached to the grants.

3. PAIMI is spending legislation drafted in terms resembling those of FERPA and HAVA, and it does not create a cause of action permitting state P&A systems to enforce its conditions. As Chief Judge Easterbrook pointed out in his dissent in this case,

PAIMI, like HAVA, creates third-party beneficiaries. App. at 49a (Easterbrook, J., dissenting). HAVA did not create rights for the Ohio Republican Party because it is the United States Attorney General who can sue to enforce the provisions of HAVA. Similarly, PAIMI does not create rights for IPAS because HHS can act to enforce the provisions of PAIMI—in particular by cutting off grants to the state.

PAIMI is written so as to make clear to the grantee state what is required of it to maintain its federal funding. PAIMI directs that a P&A system that receives money under § 10803 "shall . . . investigate incidents of abuse and neglect of individuals with mental illness." App. at 110a-11a; 42 U.S.C. § 10805(a)(1)(A). In order to carry out these investigations, P&A systems "shall . . . have access to all records of any individual who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access[.]" App. at 110a-11a; 42 U.S.C. § 10805(a)(4)(A).

Furthermore, the DDA Act and PAIMI expressly condition DDA grants on having a compliant P&A system, which leaves the grant-making agency, HHS, as the only entity in a position to remedy (by way of denying new grants) a state's non-compliance. The DDA Act explicitly describes the requirements a P&A system must meet "[i]n order for a State to receive an allotment under [42 U.S.C. § 15022]." App. at 125a-32a; 42 U.S.C. § 15043. PAIMI itself

further specifies that "[t]he Secretary [of HHS] shall make allotments under this subchapter to eligible systems to establish and administer systems . . . which meet the requirements of section 10805 [entitled 'System Requirements']." App. at 110a-11a; 42 U.S.C. § 10803.

This text is very similar to the provisions at issue in *Gonzaga* and *Brunner*. Like those contested provisions, the provisions of PAIMI (1) direct the conduct of state officials whose states receive grants, App. at 111a-17a; 42 U.S.C. § 10805; (2) do not contain rights-creating language for the grantees but instead impose obligations on them, App. at 111a-17a; 42 U.S.C. § 10805; (3) provide for the suspension or removal of funding for noncompliance, 42 C.F.R. § 51.10; and (4) allow federal authorities to bring suit to enforce the provisions. *See* App. at 111a-17a; 42 U.S.C. § 10805.

4. The Seventh Circuit, however, found that Congress intended to create a right of action for P&A systems to enforce PAIMI, stating that "Congress phrased the PAIMI Act in terms that grant rights to the protection and advocacy system in each state . . . ." App. at 20a. To support this conclusion, the Seventh Circuit cites 42 U.S.C. § 10805(a), which states that "'A system established in a State under section 10803 of this title to protect and advocate the rights of individuals with mental illness shall . . . (3) have access to facilities in the State providing care or treatment; (4) in accordance with section 10806 of this title, have access to all records of several categories of patients." App. at 20a. Additionally,

the Seventh Circuit, citing 42 U.S.C. §§ 10805(a)(1)(B) and (a)(1)(C), concluded that "[a] suit for access to patient records falls squarely within the statutory authority to pursue 'legal and other appropriate remedies to ensure the protection of individuals with mental illness . . . .'" App. at 21a.

As Chief Judge Easterbrook points out in his dissent, however, Section 10805 is entitled "System Requirements" not "System Rights." App. at 51a (Easterbrook, J., dissenting). Thus, Section 10805 instructs states how a P&A system must be set up to receive funding; it does not create rights for P&A systems once they are established.[4]

On this score, telling grantee states that a compliant P&A system "shall . . . have the authority to pursue administrative, legal, and other appropriate remedies," App. at 111a; 42 U.S.C. §

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[4] Furthermore, as Chief Judge Easterbrook observed, reading "shall" in the PAIMI Act (as in "shall . . . have the authority to pursue administrative, legal, and other appropriate remedies," 42 U.S.C. § 10805(a)(1)(B)) to mean "has a right to" produces strange linguistic results. App. at 51a (Easterbrook, J., dissenting). The example used by Chief Judge Easterbrook is Section 10805(a)(10), which instructs that States "shall . . . not use allotments . . . in a manner inconsistent with section 14404 of this title." 42 U.S.C. § 10805(a)(10). *Id.* Substituting "has a right to" for "shall" in that command, as the majority essentially did for other portions of PAIMI, would awkwardly create a "right" for P&A systems not to misuse funds. *Id.*

10805(a)(1)(B), merely instructs states as to the *types* of activities in which a compliant P&A system will engage. That is, this text means that, *if* administrative, legal, or other remedies otherwise exist, a compliant P&A system must have authority to use those means to advocate for its clients. This text does not itself, however, "grant rights to the protection and advocacy system in each state" as the Seventh Circuit majority has held. App. at 20a.

In a similar vein, the Seventh Circuit pointed to PAIMI text that requires P&A systems to exhaust administrative remedies before filing lawsuits as evidence of congressional intent to create a cause of action, stating, "[t]he provision would have little purpose if protection and advocacy systems like IPAS were not empowered to sue to enforce the PAIMI Act." App. at 22a. This inference is incorrect, particularly in light of *Brunner*, where not even the actual provision of administrative procedures (much less the mere mention of some undefined such procedure) was enough to imply a right of action. This text in PAIMI creates no administrative process and no cause of action. It instead contemplates that P&A systems may have legal remedies arising from *other* laws that require exhaustion of administrative remedies, and merely says that P&A systems may not ignore such exhaustion requirements. Again, this text of PAIMI provides the general instructions for P&A system structures; it does not purport to grant rights or enforcement mechanisms.

More fundamentally, by finding judicially enforceable rights based on the mere mention of administrative exhaustion in the PAIMI act, the Seventh Circuit improperly collapsed the *Gonzaga* two-part right-remedy inquiry. The court in effect cited a statutory precondition for seeking judicial relief as evidence that the statute itself creates judicially enforceable rights. *See* App. at 22a n.11. *Gonzaga* precludes this mode of analysis and requires instead express congressional provision of enforceable rights. *See, e.g.*, *Gonzaga*, 536 U.S. at 280 ("We made clear that unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983."). On multiple occasions the Court has made it abundantly clear that finding whether a right exists is an inquiry not only distinct from but also precedent to any inquiry about available remedies. *See Sandoval*, 532 U.S. at 286; *Davis*, 442 U.S. 230. So, even if the Seventh Circuit correctly read PAIMI to establish an administrative exhaustion requirement (and it did not), that was not enough to infer enforceable rights under PAIMI.

The Seventh Circuit attempted to distinguish PAIMI from the statutes at issue in *Sandoval* and *Brunner* and the regulation in *Gonzaga* by noting that "the PAIMI Act's key language is not directed at an administrator of federal funds or even at the State of Indiana as a funding recipient." App. at 27a. But the statute is phrased precisely in terms of what a P&A system must be able to do in order for *the state* to receive DDA Act grants—not simply

grants to fund the P&A system, but grants to fund Part B of the DDA Act, which allots federal money to states with Governor's Councils on Disabilities. *See* 42 U.S.C. § 15043(a). What is more, as the court recognized, 42 C.F.R. § 51.10 "authorizes suspension or termination of grant payments . . . based on a protection and advocacy system's failure to comply with the [PAIMI] Act." App. at 30a n.13. The court, however, rejected that administrative remedy as not "comparable to those that were important factors in *Sandoval*, *Gonzaga*, and *Brunner*," App. at 28a, because "[n]one of these administrative enforcement mechanisms offer any relief at all for IPAS or any other protection and advocacy system if a recalcitrant state violates its obligations . . . ." App. 30a n.13.

The question, however, is not whether a congressional enactment affords relief for any particular individual or agency aggrieved by lack of state compliance with a federal grant program. Rather, the existence of remedies "depend[s] on the statutory text and structure, not on judges' views about how much enforcement, and by whom, is optimal." App. at 49a (Easterbrook, J., dissenting). Indeed, generally with "legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)).

Here both the majority and concurring Seventh Circuit opinions proceed from the belief that PAIMI should not be enforced by the termination of the DDA Act grants, discounting that remedy as "perversely counterproductive." App. at 30a; App. at 38a (Posner, J., concurring) ("Of course the threat to defund might be enough to bring the state to heel. But that is not certain. The state and the federal government would be playing a game of chicken . . . ."); *see also* App. at 60a (Easterbrook, J., dissenting). Such a view, however, "reflects a fundamental disagreement with the Supreme Court, which has held the principal and often exclusive method of enforcing conditions on federal grants is by funding curtailments." App. at 61a (Easterbrook, J., dissenting).

Certiorari is warranted to resolve this "fundamental disagreement" between the Seventh Circuit and this Court.

III. The Decision Below Regarding Peer Review Documents Invalidates an HHS Regulation and Conflicts with a State Supreme Court Decision

The Seventh Circuit's holding that the peer review documents are "records" disclosable under PAIMI puts it into direct conflict with the United States Department of Health and Human Services as well as a state supreme court. This redefinition of "records" has far-reaching consequences for medical professionals who rely on the confidentiality of peer

review records to maintain the highest quality of care for their patients.

1. Under PAIMI, "records" that must be disclosed to P&A systems include "reports prepared by any staff of a facility rendering care and treatment" as well as "reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect and injury occurring at such facility and the steps taken to investigate such incidents . . . ." App. at 119a; 42 U.S.C. § 10806(b)(3)(A). The question is whether this definition of "records" encompasses reports of hospital peer review committees.

The Department of Health and Human Services has promulgated a rule interpreting the PAIMI definition to exclude peer review records, the confidentiality of which is otherwise protected by state law. *See* 42 C.F.R. § 51.41(c)(4). In particular, the regulation defining disclosable records provides that "nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committee." 42 C.F.R. § 51.41(c)(4). Indiana law does, indeed, protect the confidentiality of records produced by peer review committees. Ind. Code § 34-30-15-1(a) ("All proceedings of a peer review committee are confidential."). Therefore, if the HHS regulation is valid, Indiana law providing for the confidentiality of peer-review records prevails.

2. State and federal courts, and Congress itself, have issued conflicting holdings and statements concerning the validity of HHS's view of how peer-review records should be treated.

The House of Representative, when it re-authorized PAIMI in 1991, stated that "[t]he purpose of [peer review] committees is to review and evaluate patient care in the facility in order to improve the quality of care." H.R. Rep. No. 102-319, at 6 (1991), reprinted in 1991 U.S.C.C.A.N. 777, 782. Recognizing that the establishment of a peer review committee is required for accreditation by the Joint Commission on Accreditation of Health Care Organizations (JCAHO) and that forty-six states made peer review records confidential, the report states in no uncertain terms that "[i]t is the Committee's intent that the [PAIMI] Act does not preempt state law regarding disclosure of peer review/medical review records relating to the proceedings of such committees." *Id.*

Accordingly, the New Hampshire Supreme Court has upheld and enforced HHS's regulation concerning peer-review records. *Disabilities Rights Ctr., Inc. v. Comm'r, New Hampshire Dep't of Corrections*, 732 A.2d 1021, 1024 (N.H. 1999). New Hampshire's private nonprofit P&A system sued the Department of Corrections seeking access to records of the New Hampshire State Prison's Secure Psychiatric Unit (SPU). *Id.* at 1022. The P&A system claimed that PAIMI preempted state law making quality assurance records confidential. *Id.* The New Hampshire Supreme Court rejected this

argument, holding that PAIMI does not preempt the state's peer review privilege because the relevant HHS regulation states that specifically. *Id.* at 1023.

Additionally, as that court observed, reading PAIMI to preempt State laws protecting the confidentiality of peer review records "would create a result contrary to the basic congressional purpose that underlies PAIMI . . . [which is to] benefit mentally ill individuals by fostering the improvement of services and conditions at medical and psychiatric care facilities." *Id.* at 1024. In coming to this conclusion, the New Hampshire Supreme Court relied on the House Report issued during the re-authorization of PAIMI. H.R. Rep. No. 102-319, at 6 (1991), reprinted in 1991 U.S.C.C.A.N. 777, 782.

Since then, however, five federal circuits (including the decision below in this case) have held that 42 C.F.R. § 51.41(c)(4) is invalid as an unreasonable interpretation of PAIMI. *See* App. at 35a-37a; *Prot. & Advocacy Servs. for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119, 128 (2d Cir. 2006); *Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021, 1023 (8th Cir. 2006); *Ctr. for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1270 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000). The Seventh Circuit, in holding that the peer review records are covered under PAIMI, said merely that "[e]nough has been said already on the subject." App. at 36a-37a.

For its part, the United States has neither withdrawn the regulation nor conceded its invalidity. HHS, however, is in the process of promulgating a new rule, 73 Fed. Reg. 19,708, 19,715, (Apr. 10, 2008), but that process has been carrying on for two years, with no signs that HHS intends to issue a final regulation any time soon. Accordingly, certiorari is warranted to determine whether the existing HHS regulation is valid.

3. Review is all the more warranted because of the compelling policy justifications that have led nearly all states to enact some sort of peer-review privilege. States began providing protection for peer review proceedings as early as the 1950s and 1960s. *See, e.g.*, Conn. Gen. Stat. § 19a-17b (enacted 1958); Or. Rev. Stat. § 41.675 (enacted 1963); Tenn. Code Ann. § 63-6-219 (enacted 1967). Today, nearly every state has enacted some sort of peer review confidentiality and/or privilege protection. *See* Lisa M. Nijm, *Pitfalls of Peer Review: The Limited Protections of State and Federal Peer Review Law for Physicians*, 24 J. Legal Med. 541, 547 n.44 (2003) (collecting state statutes). Generally speaking, privilege protections forbid a peer review physician from testifying in court regarding peer review proceedings, while confidentiality protections provide that peer review materials, documents, audio recordings, etc., are undiscoverable and cannot be introduced as evidence. Kathryn Leaman, *Let's Give Them Something to Talk About: How the PSQIA May Provide Federal Privilege and Confidentiality Protections to the Medical Peer*

Review Process, 11 Mich. St. U. J. Med. & L. 177,183 (2007). State laws incorporate various combinations of privilege, confidentiality, and immunity protections. *Id.*

The reason these protections are so common is that peer review privileges ensure that members of the medical profession will engage in effective and candid self-evaluation that will be useful in improving the quality of health care they provide. Without such privileges, "physicians would be reluctant to sit on peer-review committees and engage in frank evaluations of their colleagues." *Roach v. Springfield Clinic*, 623 N.E.2d 246, 251 (Ill. 1993). Indeed, Dr. Beth Pfau, medical director at Larue Carter, has testified that if peer review proceedings were to lose their confidentiality shield, "there would be a negative impact on [her] ability to be forthright, open, and candid in determining responsibility for incidents reported to [her] and would destroy the implicit trust in the deliberative process. This, in turn, w[ould] negatively impact the hospital's goal to achieve the best level of care." Aff. of Dr. Beth Pfau at 1-2, S.D. Ind. Docket No. 37-1, No. 1:06-cv-1816 (Oct. 16, 2007).

The decision below and those of other circuits negate the policy choices of many states concerning disclosure of peer review reports to P&A systems, invalidate HHS's longstanding regulation on the subject, are in tension with Congress's intention that PAIMI and the DDA Act improve care for the disabled and mentally ill, and conflict with a state supreme court decision on the same issue.

Accordingly, the Court should take this case to review whether PAIMI requires disclosure of peer review documents that state law requires be kept confidential.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the
United States Court of Appeals
For the Seventh Circuit

No. 08-3183

INDIANA PROTECTION AND ADVOCACY SERVICES,

Plaintiff-Appellee,

v.

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION; ANNE W. MURPHY, in her official capacity as Secretary of the Indiana Family and Social Services Administration; GINA ECKHART, in her official capacity as Director of the Division of Mental Health and Addiction; and LARRY LISAK, in his official capacity as Superintendent of Larue Carter Memorial Hospital,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:06-cv-1816-LJM-TAB—Larry J. McKinney, Judge.

ARGUED FEBRUARY 24, 2010—DECIDED APRIL 22, 2010

Before EASTERBROOK, *Chief Judge*, and POSNER, FLAUM, KANNE, ROVNER, WOOD, WILLIAMS, SYKES, and HAMILTON, *Circuit Judges*.[1]

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[1] Judge Tinder did not participate in the consideration of

HAMILTON, *Circuit Judge.* Pursuant to the federal Protection and Advocacy for Individuals with Mental Illness Act of 1986 ("the PAIMI Act"), 42 U.S.C. § 10801 *et seq.*, the district court ordered Indiana state officials and a state agency to give plaintiff Indiana Protection and Advocacy Services ("IPAS") access to records of two mentally ill patients in a state hospital. On appeal, a panel of this court reversed, finding that the Eleventh Amendment and the lack of a statutory cause of action barred the action. *Indiana Protection and Advocacy Services v. Indiana Family and Social Services Admin.*, 573 F.3d 548, 550-52 (7th Cir. 2009). We granted rehearing *en banc* and hold: (1) the Eleventh Amendment does not bar plaintiff IPAS from seeking injunctive and declaratory relief against named state officials; (2) the PAIMI Act itself provides a cause of action for injunctive and declaratory relief to enforce the Act; and (3) plaintiff is entitled to access to peer review records of treatment of covered mentally ill patients. Accordingly, we affirm the judgment of the district court as modified to direct that the relief runs only against the named state officials in their official capacities.

I. *Legislative, Factual, and Procedural Background*

A. *The PAIMI Act and IPAS*

Upon finding that "individuals with mental illness are vulnerable to abuse and serious injury," Congress enacted the PAIMI Act in 1986 to "ensure

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this appeal.

that the rights of individuals with mental illness are protected" and to "assist States to establish and operate a protection and advocacy system for individuals with mental illness which will . . . protect and advocate the rights of such individuals through activities to ensure the enforcement of the Constitution and Federal and State statutes . . . ." 42 U.S.C. §§ 10801(a)(1), (b)(1), (b)(2)(A). The Act provides funding for a state on the condition that the state designates a "protection and advocacy system" to accomplish these goals. 42 U.S.C. § 10803(2)(A). The Act gives each state a choice. The designated protection and advocacy system may be either an independent state agency or a private entity. 42 U.S.C. § 15044(a) (Developmental Disabilities and Bill of Rights Act), incorporated by reference in 42 U.S.C. § 10802(2). IPAS, an independent state agency, is Indiana's designated protection and advocacy system under the PAIMI Act. Like any protection and advocacy system, it has the power to contract with other agencies or individuals to help provide its services. 42 U.S.C. § 10804.

The PAIMI Act gives a designated protection and advocacy system like IPAS the authority to investigate incidents of abuse and neglect of individuals with mental illness and to pursue administrative, legal, and other remedies on behalf of those individuals. 42 U.S.C. § 10805(a)(1). To achieve those objectives, the Act requires that IPAS have a right to access certain patient records. Specifically, the Act requires that IPAS "shall . . . have access to all records of any individual who is a client of the system if such individual . . . has authorized the system to have such access." 42

U.S.C. § 10805(a)(4)(A). The Act also requires that IPAS "shall . . . have access to all records of . . . any individual (including an individual who has died or whose whereabouts are unknown) (i) who . . . is unable to authorize the system to have such access; (ii) who does not have a legal guardian . . . ; and (iii) with respect to whom . . . there is probable cause to believe that such individual has been subject to abuse or neglect." 42 U.S.C. § 10805(a)(4)(B).

Whether a state designates an independent state agency or a private entity as its protection and advocacy system, the system such as IPAS must have, under federal law:

> the authority to . . . pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State; and pursue administrative, legal, and other appropriate remedies on behalf of an individual who . . . was [an] individual with [a] mental illness; and . . . is a resident of the State, but only with respect to matters which occur within 90 days after the date of discharge of such individual from a facility providing care or treatment.

42 U.S.C. §§ 10805(a)(1)(B), (C). The Act further requires:

> Prior to instituting any legal action in a Federal or State court on behalf of a[n] individual with mental illness, an eligible system, or a State agency or nonprofit organization which entered into a contract with an eligible system under

> section 10804(a) of this title, shall exhaust in a timely manner all administrative remedies where appropriate. If, in pursuing administrative remedies, the system, agency, or organization determines that any matter with respect to such individual will not be resolved within a reasonable time, the system, agency, or organization may pursue alternative remedies, including the initiation of a legal action.

42 U.S.C. § 10807(a).

The PAIMI Act requires that the designated system, whether it is a public or private entity, "shall be independent of any agency which provides treatment or services (other than advocacy services) to individuals with mental illness." 42 U.S.C. § 10805(a)(2). In states like Indiana, in which the governing authority of the agency is a multi-member governing board, the governor may appoint no more than one-third of the board members. 42 U.S.C. §§ 10802(2), 15044(a)(2). Consistent with that requirement, IPAS is governed by a board of thirteen persons. Four are appointed by the governor. The other nine are appointed by majority vote of the governing board itself. Ind. Code § 12-28-1-6(a). No board member may be an official or employee of any state agency that delivers services to the population served by IPAS. Ind. Code § 12-28-1-6(b). Having designated IPAS as the state's protection and advocacy system, Indiana is prohibited from redesignating a different agency or entity without "good cause." 42 U.S.C. § 15043(a)(4)(A).

B. *Patients 1 and 2 and the Record Requests*

Larue Carter Memorial Hospital is a psychiatric hospital operated by the Division of Mental Health and Addiction of the Indiana Family and Social Services Administration. A person identified in the record as Patient 1 was admitted to Larue Carter on June 21, 2006. Patient 1 was transferred to Wishard Memorial Hospital six days later and died at Wishard on July 31st. In response to Patient 1's death, a Mortality Review Committee convened at Larue Carter on August 11th. The Committee's report was completed on August 28th. In the meantime, a Larue Carter staff member provided information to IPAS that led it to open an abuse and neglect investigation concerning Patient 1's care while at Larue Carter. An IPAS advocate reviewed Patient 1's chart at Larue Carter and then requested Patient 1's "complete chart" on August 30th. The hospital denied IPAS's request, explaining that Patient 1's parents had not signed a release. On September 13th, IPAS also requested a copy of reports prepared by the Mortality Review Committee. The hospital also denied this request.[2]

Another person identified as Patient 2 was admitted to Larue Carter in November 2003. On August 26, 2006, Patient 2 left Larue Carter's grounds without approved leave. He was apprehended by a state police officer with assistance from hospital staff. Upon his return to the hospital, Patient 2 filed a grievance with the hospital alleging that three hospital employees and two police officers

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[2] The parties have advised the court that the defendants now have released Patient 1's medical records to IPAS but not the peer review records.

had battered, assaulted, and attempted to murder him. Patient 2 also filed a complaint with IPAS and signed a release authorizing IPAS to have access to his records. IPAS requested a copy of the hospital's investigation into Patient 2's grievance. The hospital provided a summary of its "investigation results" but did not provide any of the underlying records. IPAS also requested the "incident report" generated by Larue Carter in response to the events of August 26th. The hospital also denied this request.[3]

The PAIMI Act defines "records" broadly to include "reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records." 42 U.S.C. § 10806(b)(3)(A). In 1997, the United States Department of Health & Human Services issued a set of regulations for the PAIMI Act. The regulations define the word "records" broadly, 42 C.F.R. §§ 51.41(c)(1)-(4), but note "that nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review

[3] The defendants contend on appeal that no investigative reports were actually created with respect to Patient 2 and that they have provided IPAS with access to all incident reports. IPAS is not yet convinced that it has all the documents about Patient 2 that it seeks, and that is a disputed issue better addressed to the district court.

committees." 42 C.F.R. § 51.41(c)(4).[4] The PAIMI Act aside, Indiana state law regulates the disclosure of "communications, proceedings, records, determinations, or deliberations" of a "peer review committee." Ind. Code § 34-30-15-1(f)(2).[5]

C. *Procedural History*

IPAS sued the State of Indiana, the Family and Social Services Administration, and three named state officials in their official capacities. IPAS sought injunctive and declaratory relief under the PAIMI Act, requesting a declaration that the defendants violated IPAS's right to access the requested records and a permanent injunction against restricting IPAS's reasonable access to "records" as defined by the PAIMI Act. IPAS did not seek monetary damages. Each side moved for summary judgment. IPAS argued that the defendants were violating the PAIMI Act by denying it access to the records it requested. The defendants asserted that the PAIMI Act did not require them to give IPAS access because IPAS did not have the consent of Patient 1's parents and because the peer review and root cause

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[4] The Department of Health and Human Services has issued new proposed regulations under the Developmental Disabilities Act that would remove this exception for peer review records, see 73 Fed. Reg. 19708, 19731-32 (April 10, 2008), but the department has not taken final action.

[5] A "peer review committee" under Indiana law is a committee that is organized by a hospital or other medical facility having the responsibility of evaluating the qualifications of a professional health care provider, the patient care rendered by a professional health care provider, or the merits of a complaint brought against a professional health care provider. Ind. Code § 34-6-2-99(a).

documents were not covered by the PAIMI Act. The court granted IPAS's motion and entered judgment for IPAS.

On appeal, the defendants argued only that the district court erred on the merits of the "records" issue. A panel of this court reversed. *Indiana Protection and Advocacy Services v. Indiana Family and Social Services Admin.*, 573 F.3d 548, 550-53 (7th Cir. 2009). The panel did not reach the merits but ordered supplemental briefing and then found: (a) the PAIMI Act did not give IPAS an express right of action; (b) IPAS could not sue under 42 U.S.C. § 1983 because IPAS is a state agency and thus is not a "person" for purposes of that section; and (c) the Eleventh Amendment barred IPAS's suit, and the *Ex parte Young* doctrine would not provide an exception. The panel viewed IPAS's lawsuit as a suit by one arm of the state suing another, and viewed the remedy IPAS sought as a remedy for a concrete injury rather than an injunction for prospective relief. *Id.* at 553. We granted IPAS's petition for rehearing *en banc*. The United States has appeared as *amicus curiae* in support of IPAS.

II. *The Eleventh Amendment and Ex parte Young*

The Eleventh Amendment to the Constitution provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Notwithstanding the phrase "Citizens of another State," the Supreme Court "has consistently held

that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (internal citations omitted). If properly raised, the amendment bars actions in federal court against a state, state agencies, or state officials acting in their official capacities. *Id.* at 663.

The defendants engaged in two rounds of litigation of this case—one before the district court, and one before this court—without raising the Eleventh Amendment as a defense to IPAS's action. After the panel raised the issue, defendants embraced it. The Eleventh Amendment is unusual in that it does not strictly involve subject matter jurisdiction and is thus waivable, see *Lapides v. Board of Regents of Univ. System of Georgia*, 535 U.S. 613, 620 (2002), but a court may raise the issue itself, *Higgins v. Mississippi*, 217 F.3d 951, 954 (7th Cir. 2000) (affirming dismissal on district court's own initiative); see generally *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010) (reminding lower federal courts to preserve distinction between genuine jurisdictional restrictions and other claim-processing requirements or elements of claims). If the panel had not chosen to raise the Eleventh Amendment issue, this non-jurisdictional defense would have been forfeited. See *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 389 (1998). Because the panel opened the door, however, we address the defense.

There are three principal types of exceptions to the Eleventh Amendment's bar. See *MCI*

Telecommunications Corp. v. Illinois Bell Telephone Co., 222 F.3d 323, 337 (7th Cir. 2000). First, a state may waive immunity by consenting to suit in federal court. Second, Congress may abrogate the state's immunity through a valid exercise of its powers under recognized constitutional authority, such as by later constitutional amendments. Third, under *Ex parte Young*, 209 U.S. 123, 159-60 (1908), a plaintiff may file "suit[ ] against state officials seeking prospective equitable relief for ongoing violations of federal law. . . ." *Marie O. v. Edgar*, 131 F.3d 610, 615 (7th Cir. 1997). *Ex parte Young* began with a suit against state officials to enjoin enforcement of a state railroad commission's order requiring rate reductions. Plaintiffs contended that the rate reductions would violate the United States Constitution. See 209 U.S. at 129-30. The Supreme Court held that the Eleventh Amendment did not bar the plaintiff's suit, explaining that when a state official violates the federal Constitution, that official acts outside the scope of his or her authority and is no longer entitled to the state's immunity from suit. *Id.* at 155-56. *Ex parte Young* applies to suits to enforce federal statutes as well as the federal Constitution. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156 n.6 (1978) (holding that *Ex parte Young* allowed suit in federal court against named state official for violating federal statute); see also *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (*Ex parte Young* authorized suit against state officials challenging state statute as preempted by federal statute); *MCI Telecommunications*, 222 F.3d at 345 (applying *Ex parte Young* to suit against state officials under federal Telecommunications Act).

IPAS argues that *Ex parte Young* authorizes this suit against state officials seeking prospective relief. We agree.

A court applying the *Ex parte Young* doctrine now "need only conduct a 'straightforward inquiry' into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645 (2002), quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part and concurring in judgment). That inquiry is satisfied here. IPAS named individual state officials as defendants in its lawsuit. It alleges that those officials have obstructed its access to records under the PAIMI Act, an ongoing violation of federal law. The relief IPAS seeks—reasonable access to the records—is also prospective.[6]

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[6] The defendants suggest that *Ex parte Young* does not apply because the Supreme Court has applied the Eleventh Amendment to plaintiffs' efforts to obtain federal court orders to state governments to turn over property to plaintiffs. See generally *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). *Treasure Salvors* and other historic shipwreck cases such as *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), and *Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665 (7th Cir. 1992), populate a colorful corner of Eleventh Amendment law, but they provide no relevant guidance here. IPAS does not seek to seize possession of the state records. IPAS seeks only access to the records. Permitting IPAS to inspect and copy the records would not infringe on the defendants' otherwise rightful ownership and possession of the records. See *Barnes v. Black*, 544 F.3d 807, 812 (7th Cir. 2008)

We cannot fault the district court for not addressing a defense that the defendants chose not to raise. Once the Eleventh Amendment issue was on the table, however, IPAS conceded that it may not sue either the State of Indiana or any of its agencies. We modify the judgment to remove the State and the Family and Social Services Administration as named defendants, but the official capacity claims against the named state officials survive under *Ex parte Young*.

To avoid *Ex parte Young*, defendants offer two related arguments based on the nature of the plaintiff. First, defendants argue that because IPAS is technically a state agency, its federal lawsuit is a special sort of infringement of the state's sovereignty. Relying on *Coeur d'Alene Tribe*, defendants assert that "to permit Indiana to sue Indiana in federal court would plainly upset the State's core sovereignty interests." Second, defendants argue that this lawsuit is merely an "intramural" suit between two state agencies. Def. Rehearing Br. 11-13.

The threshold problem with these arguments is that the *Ex parte Young* doctrine focuses on the identity of the defendant and the nature of the relief sought, not on the nature or identity of the plaintiff. In any event, *Coeur d'Alene Tribe* does not support defendants here. In that case, a federally-recognized Indian tribe sought a declaratory judgment in

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(stating that federal court orders to state governments to produce documents for inspection do not compromise state sovereignty or violate Eleventh Amendment).

federal court against the state of Idaho, various state agencies, and several state officials in an effort to establish the tribe's entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands and bed of Lake Coeur d'Alene. The Supreme Court held that the Eleventh Amendment barred the tribe's suit and that the *Ex parte Young* exception did not apply. The Court recognized that "an allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction." 521 U.S. at 281. Nevertheless, the Court treated *Coeur d'Alene Tribe* as an unusual case that was an exception to the *Young* doctrine because it would decide the state's ownership and legal and regulatory authority over "a vast reach of lands and waters long deemed by the State to be an integral part of its territory." 521 U.S. at 282.

Although *Coeur d'Alene Tribe* seemed to introduce a new balancing approach (and new uncertainty) to the application of *Ex parte Young*, see *id.* at 278, the Supreme Court then turned away from that balancing approach in *Verizon Maryland* and returned to the "straightforward" inquiry into "whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 535 U.S. at 645; see *Ameritech Corp. v. McCann*, 297 F.3d 582, 588 (7th Cir. 2002) ("While the Supreme Court [in *Coeur d'Alene Tribe*] seemed to advocate this balancing approach, a majority of the Court in *Verizon* rejected it."); see also *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) (noting that *Verizon* limited the "reach" of *Coeur d'Alene Tribe*).

Regarding defendants' second argument to avoid *Ex parte Young*, we have written in a different context that "federal courts should not get involved unnecessarily in what may be intramural struggles of state government even if invited to do so by one of the contenders." *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845, 848 (7th Cir. 1985). And it is difficult to see how a case or controversy exists within the meaning of Article III of the Constitution if, for example, one state agency sues another and the heads of both agencies serve at the pleasure of the governor. It would be as if the governor were suing himself.

But a closer look at the details of this case shows that the defendants' effort to portray this case as an "intramural" dispute is not persuasive. While the defendant Secretary of the Family and Social Services Administration serves at the pleasure of the governor, plaintiff IPAS is not a traditional state agency. It is independent of the governor to a degree that is unusual and perhaps unique among Indiana agencies. In the PAIMI Act, Congress took care to insulate protection and advocacy services, including those that are state agencies, from state government control. As noted, the governor may not appoint more than one third of the IPAS governing board. 42 U.S.C. § 10802(2); Ind. Code § 12-28-1-6(a)(1). The federal government funds IPAS directly under the PAIMI Act. IPAS is exempt from personnel measures potentially affecting other state agencies, such as hiring freezes, reductions in force, prohibitions on travel, or any other policies that might interfere with IPAS's ability to carry out its functions. 42 U.S.C. § 15043(a)(2)(K). As a matter of

federal law, IPAS has authority, independent of the state administration, to "pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State." 42 U.S.C. § 10805(a)(1)(B). Congress thus has provided as a matter of federal law that IPAS is insulated from the type of state control over policy, budget, personnel, and governance that could justify treating this as an "intramural" dispute. In a sense, given its unusual independence from state government, the special federal responsibilities it carries out, and the direct federal funding it receives, IPAS is closer to being a specialized agent of the federal government for these purposes than it is to being an ordinary state agency.

Indiana's use of IPAS's status as an independent state agency to support the State's late reliance on the Eleventh Amendment to block this lawsuit also seems, frankly, unfair. Congress gave each state the choice to establish a protection and advocacy system as either an independent state agency or a private not-for-profit entity. Indiana made the choice to set up IPAS as an independent state agency. If we gave that choice any weight in the Eleventh Amendment inquiry, we would be permitting Indiana to use its own choice to set up an independent state agency as a means to shield its state hospitals and institutions from the very investigatory and oversight powers that Congress funded to protect some of the state's most vulnerable citizens. That result would be strange indeed. The combination, moreover, of the state's choice to set up an independent agency and its failure to raise the Eleventh Amendment issue itself also makes it difficult to see how this lawsuit

poses a serious threat to any special sovereignty interest of the state.[7]

The defendants suggest that IPAS is free to bring its lawsuit against the state defendants in state court. However, they point to no state law that would provide an adequate remedy, and if the Eleventh Amendment prohibited IPAS from suing the defendants under the PAIMI Act in federal court, it would also prohibit IPAS from suing the defendants under the PAIMI Act in state court. See *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that Congress cannot abrogate the states' immunity from private suit in their own courts).[8]

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[7] It is abundantly clear that Congress was spurred to action based on the conditions within *state-operated* facilities. The PAIMI Act of 1986 resulted from a nine-month Congressional staff investigation that detailed appalling conditions in many state-operated mental health institutions. See S. Rep. 99-109 at 1 (1985), and S. Hrg. 99-50, Pt. 2 (1985) (staff report).

8 After the *en banc* argument, defendants submitted a letter stating that they would have no immunity from a mandamus action in state court. Even if that were enough to avoid the straightforward application of *Ex parte Young* here, and it is not, the state court option would also be inadequate. The applicable law would be federal law—the right of access to records granted in 42 U.S.C. § 10806—so the *Alden v. Maine* problem would remain. Indiana has not enacted legislation granting such rights under state law. Moreover, Congress clearly intended the protection and advocacy systems—all of them—to be able to respond quickly to threats of imminent harm to their constituents. See, *e.g.*, 42 U.S.C. § 10805(a)(4)(C) (permitting systems to access records of individuals with mental illness who have legal guardians or representatives but whose health or safety is in serious and immediate jeopardy if the individual's guardian or representative has refused to act); 42 U.S.C. § 10807(b) (providing exception to the system's

In short, IPAS's lawsuit is a classic application of *Ex parte Young*. It asks a federal court to order state officials to modify their conduct to comply with federal law. Plaintiff's status as an unusually independent state agency does not change the *Young* analysis. The Eleventh Amendment does not bar IPAS's request for declaratory and injunctive relief against the named state officials.[9]

III. *Right of Action Under the PAIMI Act*

The defendants next argue that the PAIMI Act does not itself provide IPAS with a cause of action to seek equitable relief. Defendants contend that protection and advocacy systems can sue only under 42 U.S.C. § 1983. But, citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65-66 (1989) (holding that a state agency was not a "person" that could be sued as a defendant under § 1983), defendants' catch is that IPAS is a state agency and thus is not a

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obligation to pursue administrative remedies prior to filing suit where legal action is instituted to prevent or eliminate imminent harm to an individual with mental illness). As counsel for IPAS put it at oral argument, there is no such thing as a "preliminary mandamus" action.

[9] The Fourth Circuit reached a different conclusion in *Virginia v. Reinhard*, 568 F.3d 110, 118-24 (4th Cir. 2009) (holding that protection and advocacy state agency's suit seeking records under the PAIMI Act was barred by Eleventh Amendment; *Ex parte Young* not applicable to suit where plaintiff was state agency), *petition for cert. filed*, 78 U.S.L.W. 3416 (U.S. Jan. 19, 2010) (No. 09-529). For the reasons explained in the text, we respectfully disagree. We also note that the Virginia defendants had argued in an earlier case that the state protection and advocacy system had obtained relief under *Ex parte Young*. See *Virginia Office for Protection and Advocacy v. Reinhard*, 405 F.3d 185, 187-88 (4th Cir. 2005).

"person" under section 1983. See *Virginia Office for Protection and Advocacy v. Reinhard*, 405 F.3d 185, 189-90 (4th Cir. 2005) (state agency could not sue under section 1983 to enforce rights under PAIMI Act). If that's true, then IPAS and other state-agency protection and advocacy systems cannot obtain relief in federal court by any avenue. According to defendants, the only relief from Indiana's violations of the PAIMI Act would be for the federal government to cut off funding for IPAS itself—a sanction that would serve only to undermine the PAIMI Act rather than enforce it.

We reject that improbable interpretation of the Act. We hold that the PAIMI Act itself authorizes IPAS to bring this suit for injunctive and declaratory relief.[10] To determine whether a cause of action exists, "the judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "For a statute to create such private rights, its text must be 'phrased in terms of the persons benefitted.'" *Gonzaga University v. Doe*, 536 U.S. 273, 284 (2002), quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692, n.13 (1979). Where a statute "by its terms grants no private rights to any identifiable class," the question whether Congress intended to create a cause of action "is definitively answered in the negative." *Gonzaga*, 536 U.S. at 283-84, quoting *Touche Ross &*

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[10] The parties agree that the PAIMI Act does not provide IPAS (or other protection and advocacy systems) with a cause of action for damages.

Co. v. Redington, 442 U.S. 560, 576 (1979). Where the text and structure of a statute do not provide an indication that Congress intended to create new individual rights, there is no basis for a private suit. *Gonzaga*, 536 U.S. at 286.

Looking to the PAIMI Act, we find that Congress expressed its intent to create a legally enforceable right of access to patient records vested in an identifiable class—protection and advocacy systems, including IPAS, which act for the benefit and protection of mentally ill individuals who may have difficulty acting for themselves. If and when those protection and advocacy systems are denied their right of access, the PAIMI Act shows with sufficient clarity that the remedy is a suit to enforce the right of access in federal or state court.

Congress phrased the PAIMI Act in terms that grant rights to the protection and advocacy system in each state: "A system established in a State under section 10803 of this title to protect and advocate the rights of individuals with mental illness shall— . . . (3) have access to facilities in the State providing care or treatment; (4) in accordance with section 10806 of this title, have access to all records of" several categories of patients. See 42 U.S.C. § 10805(a). This is not only a condition for funding. The Act further provides that the system shall have the power to bring legal actions to ensure the protection of its constituents and to litigate on behalf of its constituents. A system designated under the Act "shall have the authority to pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with

mental illness who are receiving care or treatment in the State" and to "pursue administrative, legal, and other remedies" on behalf of individuals with mental illness who are receiving or have received care or treatment from a facility up to 90 days after their discharge from care. 42 U.S.C. §§ 10805(a)(1)(B), (a)(1)(C). A suit for access to patient records falls squarely within the statutory authority to pursue "legal and other appropriate remedies to ensure the protection of individuals with mental illness. . . ."

As we read the statute, these powers are conferred upon a protection and advocacy system like IPAS as a matter of federal law by virtue of its designation by a state. Contrary to the dissent's suggestion, nothing in the PAIMI Act requires the state to adopt legislation or regulations granting such powers as a matter of state law.

Another section of the PAIMI Act offers further evidence that Congress intended that protection and advocacy systems have the ability to sue under the Act. The Act requires that "*prior to instituting any legal action in a Federal or State court* on behalf of a[n] individual with mental illness, an eligible system . . . shall exhaust in a timely manner all administrative remedies where appropriate. If . . . the system . . . determines that any matter with respect to such individual will not be resolved within a reasonable time, the system . . . may pursue alternative remedies, including the initiation of a legal action." 42 U.S.C. § 10807(a) (emphasis added). The provision would have little purpose if protection

and advocacy systems like IPAS were not empowered to sue to enforce the PAIMI Act.[11]

The defendants argue that the PAIMI Act is an exercise of Congress's spending power to condition receipt of specified federal funds on compliance with specified terms. The defendants contend that, like the spending power statutes at issue in *Sandoval* and *Gonzaga*, the PAIMI Act does not include an express provision for a private right of action and may be enforced only by a federal executive action to terminate a non-compliant state's funding. The argument reads *Sandoval* and *Gonzaga* too broadly. Both eschew sweeping rules and instead teach the need for close attention to the specific language and structure of the statute at issue. Both cases are easily distinguishable based on the critical features of the Supreme Court's reasoning.

The plaintiff in *Sandoval* sued to enforce disparate-impact regulations promulgated by the

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[11] The dissent criticizes our reliance on section 10807 as turning a precondition to suit into an authorization to sue. *Post* at 57. Our point is simply that when Congress established the precondition to suit, it obviously assumed that the suit could be brought in the first place. We also see nothing in the statutory phrase "any legal action in a Federal or State court on behalf of an individual with mental illness" that would exclude this or similar suits for access to records of individuals with mental illness. If the dissent is correct that 42 U.S.C. § 1983 offers a cause of action—but only for private entities—section 10807 might be more useful. But there is no indication in the statute or elsewhere that Congress intended that a state's choice between the two types of protection and advocacy systems would have such dramatic consequences for their enforcement powers.

Department of Justice under Title VI of the Civil Rights Act of 1964.[12] The particular regulation under review forbade funding recipients from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." Alabama amended its Constitution to declare English "the official language of the state" and began administering state driver's license examinations only in English. Sandoval sued for an injunction against the director of the state agency. The Supreme Court recognized that Title VI itself included an implied private right of action for both injunctive relief and damages for violations of the statute itself, but the Court found that the same authority did not extend to violations of the disparate-impact regulation. *Sandoval*, 532 U.S. at 279-80, 293. The Court pointed out that the regulation was phrased not in terms of creating rights but in terms of instructions to federal funding agencies. *Id.* at 288-89. The Court explained that "statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Sandoval*, 532 U.S. at 289, quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981). The disparate-impact regulation's focus was "twice removed from the individuals who will ultimately benefit from Title VI's protection" because it was " 'phrased as a directive to federal agencies engaged in

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[12] Title VI provides that no person shall "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI. 42 U.S.C. § 2000d.

the distribution of public funds.'" 532 U.S. at 289, quoting *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 772 (1981) (analyzing the Davis-Bacon Act).

A year after *Sandoval*, the Court in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), held that the Family Educational Rights and Privacy Act of 1974 did not provide a private right of action for damages and created no rights enforceable under 42 U.S.C. § 1983. The Court therefore reversed a jury verdict for damages in favor of an individual and against a recipient of federal funds. FERPA, like section 602 of Title VI, was enacted under Congress's spending power. It directs the Secretary of Education to withhold federal funds from any educational institution that fails to comply with certain conditions. One condition is that the institution not release a student's educational records without written consent. See 20 U.S.C. § 1232g(b)(1). A university official discussed allegations of sexual misconduct against Doe and thus prevented him from being certified as a teacher. Doe sued, arguing that section 1232g(b)(1) of FERPA granted him a right enforceable under section 1983 to sue for damages caused by the unauthorized release of personal information. The Court disagreed, finding that section 1983 provided a remedy for the deprivation only of "rights," not of vague benefits or privileges, and that Congress had not granted any private rights to any class of individuals in FERPA. *Gonzaga*, 536 U.S. at 283-84. FERPA's non-disclosure provisions lacked "rights-creating" language and spoke only to the Secretary of Education, directing that "no funds shall be made

available" to an institution with a prohibited policy or practice. *Id.* at 287, quoting 20 U.S.C. § 1232g(b)(1). The focus of the statute, again, was "two steps removed from the interests of individual students" and did not confer individual rights. *Id.*

Our dissenting colleague contends that *Brunner v. Ohio Republican Party*, ___ U.S. ___, 129 S. Ct. 5 (2008), conflicts with our reasoning here. In *Brunner*, the Court issued a one-paragraph emergency opinion summarily vacating a temporary restraining order that had directed the Ohio Secretary of State to update Ohio's voter database to comply with section 303 of the Help America Vote Act of 2002 a few weeks before the national election. Citing *Gonzaga* and *Sandoval*, the Supreme Court wrote that the plaintiffs were "not sufficiently likely to prevail on the question whether Congress has authorized . . . the issuance of a TRO." *Brunner*, 129 S. Ct. at 6.

Close examination of the statute at issue and the opinions from the Sixth Circuit's *en banc* review illuminates the Supreme Court's terse conclusion and shows that our conclusion here is consistent with the case. The statute in *Brunner* provided:

> The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to

> verify the accuracy of the information provided on applications for voter registration.

42 U.S.C. § 15483(a)(5)(B)(i). The state's chief election official had allegedly stopped sending data about potential "mismatches" between motor vehicle and voter registration lists some weeks before the national election. A political party and a candidate sued to require the state election official to resume sending such data, which could have provided the basis for widespread election-day challenges to voter eligibility. Within the space of a mere two weeks, a district court granted a temporary restraining order, a panel of the Sixth Circuit vacated the TRO, the Sixth Circuit *en banc* reinstated the TRO, and the Supreme Court finally vacated the TRO.

On the issue of the private right of action, the Sixth Circuit majority considered *Gonzaga* and its instructions that, in identifying statutory rights enforceable under section 1983, "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced" under § 1983, and that "such rights must be 'unambiguously conferred . . . to support a cause of action brought under § 1983.'" *Ohio Republican Party v. Brunner*, 544 F.3d 711, 719-20 (6th Cir. 2008) (*en banc*) (emphasis in original), quoting *Gonzaga*, 536 U.S. at 283. The Sixth Circuit majority concluded that whether the HAVA provision requiring datasharing agreements between election officials and motor vehicle officials created enforceable rights was a difficult and close question that did not undermine the district court's TRO. *Id.* at 720-21. Judge Moore's dissenting opinion explained in detail why the data-sharing provision of

HAVA did not create rights enforceable by individuals. 544 F.3d at 726-30. As in *Gonzaga* and *Sandoval*, the statute did not contain rights-creating language. Instead, it authorized the United States government to sue to enforce the mandates directed at state officials.

Sandoval, *Gonzaga*, and *Brunner* do not stand for a broad rule that spending power statutes can never be enforced by private actions. They show that courts must examine each statutory scheme closely. Close examination of the PAIMI Act shows that this lawsuit to enforce IPAS's right of access to records is exactly what Congress intended to authorize. Unlike the statutes in *Sandoval* and *Brunner* and the regulation in *Gonzaga*, the PAIMI Act's key language is not directed at an administrator of federal funds or even at the State of Indiana as a funding recipient. Instead, the Act directly grants rights and powers to the designated protection and advocacy system that is the plaintiff here. As the designee, IPAS "shall . . . have access to all records," 42 U.S.C. § 10805(a)(4), and "shall have the authority to pursue administrative, legal, and other appropriate remedies." 42 U.S.C. § 10805(a)(1)(B). These rights are not one or two steps removed from IPAS—they are granted directly to IPAS itself. The PAIMI Act's key requirements are not directed at the states as recipients of the funds. (The federal allotments go directly to the protection and advocacy systems, not to the states. See 42 U.S.C. § 10803.) Of states, the Act requires only that they designate their chosen protection and advocacy systems and give them the required independence. The Act does not require states to take additional steps to

empower the designated protection and advocacy systems, and Indiana has not done so. See generally Ind. Code § 12-28-1-1 *et seq.* Under the language of the federal statute, such efforts would be redundant.

Congress expressed with sufficient clarity its intent to grant immediate and legally enforceable rights to the states' designated protection and advocacy systems. Once Indiana designated IPAS, Congress vested IPAS with the right to access the necessary records and the right to sue directly under the PAIMI Act if that access is denied.

The PAIMI Act also lacks separate administrative enforcement mechanisms comparable to those that were important factors in *Sandoval*, *Gonzaga*, and *Brunner*. Section 602 of Title VI, scrutinized in *Sandoval*, empowered the Department of Justice to enforce its regulations by terminating funding to "the particular program, or part thereof," but only after notifying the recipient department or agency of its failure to comply and "fil[ing] with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action." *Sandoval*, 532 U.S. at 289-90, quoting 42 U.S.C. § 2000d-1. The Court found that section 602 expressly provided "one method of enforcing a substantive rule suggest[ing] that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290.

Similarly, FERPA, at issue in *Gonzaga*, directs the Secretary of Education to establish an office and review board for "investigating, processing,

reviewing, and adjudicating violations of [FERPA]." 20 U.S.C. § 1232g(g). Students and parents who suspect a violation can file written complaints with the board, which can initiate investigations. See 34 C.F.R. §§ 99.63-99.67. If the Secretary determines that a recipient institution is failing to comply with FERPA and that compliance cannot be secured voluntarily, the statute allows the Secretary to terminate funding to the institution. 20 U.S.C. §§ 1234c(a), 1232g(f). The *Gonzaga* Court found that Congress's decision to provide a mechanism to enforce FERPA buttressed its conclusion that the statute did not confer individual rights. *Gonzaga*, 536 U.S. at 289-90.

And as Judge Moore explained in her dissent in *Brunner*, the Help America Vote Act, too, specified that "the Attorney General may bring a civil action against any State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief . . . as may be necessary to carry out the . . . requirements under [sections 301, 302, and 303]." 42 U.S.C. § 15511; see 544 F.3d at 729-30. The statute also required states to establish detailed "State-based administrative complaint procedures" to resolve disputes under the statute. See 42 U.S.C. § 15512. That statutory provision for administrative remedies further likens the statute in *Brunner* to the statutes under review in *Sandoval* and *Gonzaga* and distinguishes it further from the PAIMI Act, which

has no comparable provisions for administrative or executive enforcement against the states.[13]

More fundamentally, under the PAIMI Act, the remedy of a funding cut-off for violations of the Act would be perversely counterproductive. As the findings set forth in 42 U.S.C. § 10801 show, Congress wanted to establish a protection and advocacy system that would protect and advocate for the rights of individuals with mental illness and investigate incidents of abuse and neglect of those individuals. See 42 U.S.C. § 10801(b). Responding to a state's violation of the Act by cutting off funding for that very system would undermine the purpose of

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[13] Although the defendants did not make this point in their briefs, the dissent observes that the PAIMI Act has an administrative enforcement mechanism under 42 C.F.R. § 51.10. That regulation authorizes suspension or termination of grant payments, among other actions, based on a protection and advocacy system's failure to comply with the Act. The problem for the dissent is that the regulation provides for remedies *only against a protection and advocacy system*, if for example it fails to live up to its obligations to submit annual reports or other documentation in response to review and monitoring by the federal government. Such remedial actions could lead to suspension or termination of funding to the system. See *id.*, incorporating 45 C.F.R. Part 74, 42 C.F.R. Part 50. (Another administrative mechanism establishes a detailed procedure a state must follow to designate a new protection and advocacy system. 45 C.F.R. § 1386.20.) None of these administrative enforcement mechanisms offer any relief at all for IPAS or any other protection and advocacy system if a recalcitrant state violates its obligations, such as the obligation to provide access to patient records. Unlike the situations in *Sandoval*, *Gonzaga*, and *Brunner*, the only available remedy for the violations alleged by IPAS is a lawsuit to enforce its rights under the PAIMI Act.

the entire Act. It is highly unlikely that Congress intended for such a funding cut-off to be the response to such violations by a state.

IPAS has argued that 42 U.S.C. § 1983 provides an alternative basis for its suit and that its director could become the plaintiff (attempting to avoid the state agency problem discussed above). Section 1983 fits awkwardly with the PAIMI Act because a protection and advocacy system has rights against both public and private care providers. The latter would not act under color of state law and could not be reached under section 1983. We agree with the position advocated by the United States as *amicus curiae*. Because the PAIMI Act itself provides a cause of action for equitable relief, we decline to address IPAS's ability to pursue relief under 42 U.S.C. § 1983.

The dissent also contends that our decision runs afoul of the "clear-statement" principle expressed in *Arlington Central School District Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006), among other cases. Congress cannot subject the state to suit by the protection and advocacy system, goes the argument, without spelling out more clearly in the statute that such suits are authorized; otherwise it would be as if one party to a contract tried to sneak an onerous provision into the deal without the other party's knowledge. This argument of unfair surprise would have more weight if it had been raised by the state defendants before the district court, or before the panel, or indeed in any other protection-and-advocacy lawsuits against state defendants in more than 20 years of experience under the PAIMI Act.

Instead, it is the argument itself that is the late surprise.

State hospitals and institutions were the primary concern of the PAIMI Act, see note 6, above, and for more than 20 years under the PAIMI Act, we and other circuits and numerous district courts have heard similar suits under the PAIMI Act. See, *e.g.*, *Disability Rights Wisconsin, Inc. v. State of Wisconsin Dep't of Public Instruction*, 463 F.3d 719, 725 (7th Cir. 2006) (reversing denial of injunction where private protection and advocacy system sought records from state agency, without relying on 42 U.S.C. § 1983, and providing history of protection and advocacy legislation); *Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction & Advocacy Servs.*, 448 F.3d 119 (2d Cir. 2006) (affirming injunction in favor of state agency to obtain access to patient records)[14]; *Missouri Protection & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006) (affirming injunction requiring access to patient records under 42 U.S.C. § 1983); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10th Cir.

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[14] The dissent describes the Second Circuit's decision in the *Connecticut Protection & Advocacy* case as one under section 1983, but then-Judge Sotomayor's opinion described the case as one filed "pursuant to 42 U.S.C. § 1983 and PAIMI." 448 F.3d at 122. The Connecticut protection and advocacy system is a state agency much like IPAS. See Conn. Gen. Stat. § 46a-7 et seq. If the dissent is correct that state agencies cannot sue under section 1983 or the PAIMI Act, then the Second Circuit's decision was erroneous. And if the dissent is correct, then a Wisconsin state agency overlooked a winning argument in *Disability Rights Wisconsin*, 463 F.3d at 725 (granting relief directly against state agency).

2003) (reversing denial of injunction); *Pennsylvania Protection & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000) (affirming injunction requiring access to patient records); see also, *e.g.*, *Connecticut Office of Protection and Advocacy for Persons with Disabilities v. Hartford Board of Educ.*, 464 F.3d 229 (2d Cir. 2006) (affirming injunction in favor of state agency directly under PAIMI Act); *Ohio Legal Rights Service v. Buckeye Ranch, Inc.*, 365 F. Supp. 2d 877, 883-84 (S.D. Ohio 2005) (granting injunction under PAIMI Act in favor of state agency protection and advocacy system against private care-giver); *Equip for Equality, Inc. v. Ingalls Memorial Hosp.*, 292 F. Supp. 2d 1086 (N.D. Ill. 2003) (granting injunction against private care-giver directly under PAIMI Act and state law); *Kentucky Protection and Advocacy Div. v. Hall*, 2001 WL 34792531 (W.D. Ky. Sept. 24, 2001) (granting declaratory relief in favor of state agency under PAIMI Act against private care-givers); *Wisconsin Coalition for Advocacy, Inc. v. Czaplewski*, 131 F. Supp. 2d 1039, 1047-50 (E.D. Wis. 2001) (ordering both public and private care-givers to provide access to records to private protection and advocacy system under PAIMI Act); *Trautz v. Weisman*, 846 F. Supp. 1160, 1162-63 (S.D.N.Y. 1994) (holding that state protection and advocacy system could seek relief directly under PAIMI Act against private care-givers).

Although we have not persuaded our dissenting colleague, we have tried to remain true to our role as judges rather than legislators, interpreting the PAIMI Act based on its language, structure, and purpose rather than enacting a new-and-improved brand as a matter of judicial preference. As we have

explained, close attention to the language and structure of the PAIMI Act shows that Congress made sufficiently clear its intention to authorize protection and advocacy systems to sue directly under the PAIMI Act to enforce their rights to access to patient records against both public and private care-givers for the mentally ill. As between our interpretation and the dissent's, our interpretation is more consistent with the language, structure, and purpose of the PAIMI Act as a whole.

The dissent's approach, by contrast, interprets the Act as creating a strange remedial patchwork full of holes and self-defeating funding cut-offs. In the dissent's view, in the 42 states that chose to designate private entities as their protection and advocacy systems, the private entities can sue under section 1983 to obtain records from public care-givers (those who act under color of state law). But those same private entities apparently cannot sue to obtain records from private care-givers because section 1983 would not apply.[15] On the other hand, in Indiana and the six other states that chose to designate public agencies as their protection and advocacy systems, the dissent would hold that the public agencies cannot sue to obtain records from state care-givers. Section 1983 does not apply, and the PAIMI Act does not authorize such a lawsuit. (A

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[15] We are not entirely certain whether the dissent would interpret the PAIMI Act as itself authorizing private entities to sue private care-givers for access to records. The logic of the dissent's point that private care-givers are not protected by the "clear-statement" rule (see *post* at 58) suggests that this more limited right to sue private defendants can be inferred directly from the PAIMI Act.

state could choose to enact legislation authorizing such a suit as a matter of state law, but the PAIMI Act does not require it to do so.) Yet the dissent also seems to suggest that IPAS and the other public agencies might be able to sue private care-givers to obtain records directly under the PAIMI Act (because such private care-givers are not protected by the "clear statement" rule, see *post* at 58).

Congress would have been free to enact such an inconsistent and even arbitrary remedial patchwork, of course (though it would be inconsistent with most of the cases cited above and many others). Yet the language of the statute does not give any signal that Congress intended such an odd result. We will not readily attribute to Congress the intent to do so when the more straightforward alternative is available: recognizing that protection and advocacy systems have a right to sue directly under the PAIMI Act for injunctive and declaratory relief to enforce the right to obtain the records granted by the Act itself.

IV. *"Records" Under the PAIMI Act*

Turning to the merits, the defendants argue that the peer review records IPAS seeks are not "records" under the PAIMI Act. Defendants rely on the PAIMI Act's subsequent legislative history and a Department of Health and Human Services regulation. In light of the language of the PAIMI Act itself, however, we join all other circuits that have addressed the issue and agree with IPAS that peer review records are "records" under the PAIMI Act.

The Second and Third Circuits reached this conclusion in opinions authored, coincidentally, by future Justices Sotomayor and Alito. See *Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction & Advocacy Servs.*, 448 F.3d 119, 128 (2d Cir. 2006) (Sotomayor, J.) ("The plain language of PAIMI that grants [the P&A system] access to 'all records of . . . any individual,' including 'reports prepared by any staff of a facility,' encompasses peer review reports."); *Pennsylvania Protection & Advocacy, Inc., v. Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.) (holding that the Act required access to peer review records and noting that the PAIMI Act requires that protection and advocacy systems "be given access to a defined category of records. . . . The statutory language cannot reasonably be construed to encompass identical peer review reports in some states but not others. If Congress wished to achieve that result, it needed to enact different statutory language."). The Eighth and Tenth Circuits have agreed, as well. *Missouri Protection & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021, 1023 (8th Cir. 2006) (refusing to "resort to congressional committee reports as interpretive devices" and rejecting contrary agency interpretation because the PAIMI Act's record access requirement is unambiguous); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1270 (10th Cir. 2003) (after examining the statutory language and according it a straightforward interpretation, concluding that "records" under the PAIMI Act include peer review and quality assurance records). Enough has been

said already on the subject. We agree with the treatment of this issue in those cases.

The judgment of the district court is modified to provide that the declaratory and injunctive relief runs against only the named state officials in their official capacities. As modified, the judgment is affirmed.

POSNER, *Circuit Judge.* I join Judge Hamilton's opinion without reservation, but write separately to emphasize some practical considerations that seem to me to favor recognition of IPAS's right to sue to obtain patient records.

The federal Protection and Advocacy for Individuals with Mental Illness Act of 1986, 42 U.S.C. §§ 10801 *et seq.*, assigns to "protection and advocacy" agencies such as IPAS ("Indiana Protection and Advocacy Services," an Indiana state agency that is independent of the governor and the attorney general) a whistleblower, ombudsman, watchdog, advocacy, and "private attorney general" role. Rather than loading the Department of Health and Human Services or the Justice Department with additional enforcement responsibilities, Congress told the states in effect: "if you want, we will give you federal money to help prevent the abuse of mentally ill persons in your state, but you will have to agree to designate an agency, either public or private as you choose, to 'protect and advocate for' the rights of such persons, and the agency, which we'll be paying for, must be given access to certain patient records without which it cannot perform its assigned role effectively."

But what if the hospital that has the records refuses to grant IPAS access to them? Can IPAS sue the hospital to get access? (I think we all agree that if IPAS has a right of action under the federal statute it makes no difference whether the hospital is public or private; the disagreement is over the "if.") If not—if IPAS is a helpless bystander to the state's thumbing its nose at the statute under which it has received federal money—still the federal government would not be *completely* without a remedy; it could close the money spigot. 42 C.F.R. § 51.10; see also 42 U.S.C. § 10803; cf. 20 U.S.C. §§ 1232g(f), 1234c(a), d(a); *Gonzaga University v. Doe*, 536 U.S. 273, 278- 79 (2002). But that (to change metaphors) would be cutting off one's nose to spite one's face. The unfortunates in Indiana who are the intended beneficiaries of the federal program would be worse off were the program in that state to be defunded. See *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582, 601-02 (1983) (plurality opinion); *Cannon v. University of Chicago*, 441 U.S. 677, 704- 06 and nn. 38-39 (1979); *Board of Public Instruction v. Finch*, 414 F.2d 1068, 1075-76 and n. 11 (5th Cir. 1969). Of course the threat to defund might be enough to bring the state to heel. But that is not certain. The state and the federal government would be playing a game of chicken—with Indiana's mentally ill citizens the victims of any collision that might result.

Now it is true and important that statutes are compromises between competing values and also between competing interests, and for either reason or both reasons the remedies for violations of a statute may be weakened as the bill runs the

legislative gauntlet. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 445-46, 461 (2002); *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam); *First Bank v. DJL Properties, LLC*, No. 10-8008, 2010 WL 1050283, at *2 (7th Cir. Mar. 24, 2010); *In re Establishment Inspection of Skil Corp.*, 846 F.2d 1127, 1133- 34 (7th Cir. 1988). They may even be weakened to the point of impotence. But the state does not argue that a legislative compromise deprived the bill of effective remedies.

Conceivably the federal government could sue the state hospital, even without express statutory authorization, for an injunction requiring the hospital to give IPAS access to the patient records in question. The state accepted federal money in exchange for promises that included giving the watchdog agency access to patient records. The state's acceptance created a contract and the federal government, if it sought specific performance of the state's obligation, would be enforcing a federal common law contractual right, as recognized in such cases as *Cotton v. United States*, 52 U.S. 229 (1850); *Woods v. United States*, 724 F.2d 1444, 1449-50 (9th Cir. 1984), and *United States v. Marion County School District*, 625 F.2d 607, 609-11 (5th Cir. 1980). See also the dissenting opinion in *Guardians Ass'n v. Civil Service Commission*, *supra*, 463 U.S. at 630-31, and the concurring opinion in *Bell v. New Jersey*, 461 U.S. 773, 794 (1983)—the majority opinion treated the question whether the federal government had a common law right to recover funds spent in violation of the federal grant as open. *Id.* at 782 n. 7.

But this route to relief is indirect and even redundant compared to a suit by IPAS. It would involve three parties—IPAS, the state, and the federal government, rather than just IPAS and the state. It would also be a transparent effort to circumvent a rule, if there is a rule, that forbids recognition of IPAS's right to sue the hospital because the right is not explicitly stated in the statute. For if a right of IPAS to sue for the records can't be inferred from the statute, neither can a right of the federal government to do so. Indeed the interpretive stretch would be greater. The statute entitles a protection and advocacy agency to "pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State." 42 U.S.C. § 10805(a)(1)(B). It says nothing about a suit by the federal government.

There are two possible construals of the right created by the statutory language that I just quoted. One is that IPAS merely has the legal capacity to bring a suit, like a corporation. The conferral of that right would say nothing about what suits it could bring. *Board of Education of City of Peoria v. Illinois Board of Education*, 810 F.2d 707, 709-10 (7th Cir. 1987); 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1559, p. 441 (2d ed. 1990) ("capacity has been defined as a party's personal right to come into court, and should not be confused with the question of whether a party has an enforceable right or interest"); see also Fed. R. Civ. P. 17(b). Maybe it could just bring the kind of suit a corporation or individual might bring, such as a suit for unpaid

rent. But alternatively the statutory language could mean that IPAS can bring suits that are essential to its playing its "protect and advocate" role, including suits to enforce its statutory right of access to patient records. And not just suits in a representative capacity, seeking relief for particular persons injured by the state's flouting its statutory duty. IPAS can act in such a capacity as well, but the right to do so is conferred in a separate subsection of the statute. 42 U.S.C. § 10805(a)(1)(C).

It's not as if IPAS could obtain an effective legal remedy from the state courts of Indiana. It could not. And the fact that the right that the federal statute confers on IPAS—the right of access to patient records—expressly preempts any state law prohibiting such access, see 42 U.S.C. § 10806(b)(2)(C); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1272-73 (10th Cir. 2003); *Pennsylvania Protection & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 427-28 (3d Cir. 2000), makes it all the more likely that Congress expected the right to be enforceable in a federal court. Cf. *Rice v. Office of Servicemembers' Group Life Ins.*, 260 F.3d 1240, 1247 (10th Cir. 2001).

It is not an insuperable obstacle to this suit that ever since *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court has been wary of inventing private remedies for statutory violations and now requires that the private right of action be inferable from the statute itself. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-22 (1979);

Touche Ross & Co. v. Redington, 442 U.S. 560, 571-78 (1979). The requirement reflects a realistic understanding of the role of compromise in the legislative process. Private remedies, especially private damages remedies, can greatly magnify the force of a statute. If a remedy can be imposed only in an action by a public agency—say a cease and desist proceeding by an administrative agency like the Federal Trade Commission—the potential targets of such an action have the protection of prosecutorial discretion, which places a screen between a private complaint and an enforcement action, and are not exposed to liability for damages awarded in private suits in amounts that might (in a class action for example) cause bankruptcy. For a court to spring a private remedy on the persons or firms subject to a statute is thus to change the legislative deal dramatically.

There is nothing like that here. There is no suggestion that IPAS can sue a hospital for damages, which would have the potential to harm hospitals far more than could an order to grant access to records and would be likely to increase the cost of hospital services. "Because the private right of action under Title IX [of the Civil Rights Act of 1964] is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 284 (1998). The sensible remedy in this case is an injunction commanding access.

A private right of action with appropriate remedies can be inferred from a statute that evinces

a congressional intent to authorize such a right, *Transamerica Mortgage Advisors, Inc. v. Lewis*, supra, 444 U.S. at 15-16; *Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272, 1276- 79 (7th Cir. 1995); *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 286 F.3d 613, 618-22 (2d Cir. 2002); *CSX Transportation Inc. v. Marquar*, 980 F.2d 359, 379-82 (6th Cir. 1992), as the present statute does. The Supreme Court's decision in *Alexander v. Sandoval, supra*, 532 U.S. at 286—a landmark in the march begun in *Cort v. Ash* away from judicial creation of private remedies—makes this clear: "the judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create . . . a private remedy." Consistent with this language, even after *Cort* the Supreme Court has found private remedies implicit in statutes. See, *e.g.*, *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) (implied remedy for retaliation under Title IX); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 230-35, 240 (1996) (implied remedy under the Voting Rights Act); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982) (implied remedies under the Commodity Exchange Act).

The cases rejecting judicial creation of private rights of action *ex nihilo* would defeat a suit against the state hospital administration by the guardian of a mentally ill person, seeking damages for mistreatment in a state hospital; for there is no hint in the statute of an intention to create such a right of action. That is not this case.

Nor is this a case in which the state may have been fooled into accepting federal money on conditions that, had it realized what they were, would have caused it to reject the money. The Supreme Court expressed concern with this possibility in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 639-40 (1999), when it said, quoting *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17-18 (1981), that "in interpreting language in spending legislation, we thus 'insis[t] that Congress speak with a clear voice,' recognizing that '[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.' " See also *Barnes v. Gorman*, 536 U.S. 181, 185-88 (2002). But Indiana could not have been surprised to find that IPAS could sue it for violating a condition in the federal grant that it accepted. The state knew that by accepting the money it would be committing to provide IPAS with access to patient records—knew too that IPAS had been empowered to invoke legal remedies for violations of the rights conferred on it by the federal statute. The state could not reasonably have believed that its commitment was empty, unenforceable—that it could take the money and yet be subject to no sanction for refusing to comply with the terms of the grant except that of cancellation of the program, figuratively a kind of nuclear option, as it would blow up the mentally ill of Indiana along with the federal program.

Consistent with this analysis, the Supreme Court in *Franklin v. Gwinnett County Public Schools*, 503

U.S. 60, 74-75 (1992), finding that monetary damages were available to enforce an implied remedy in a spending-clause statute, rejected the contention

> that the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress' Spending Clause power. In *Pennhurst State School and Hospital v. Halderman*, the Court observed that remedies were limited under such Spending Clause statutes when the alleged violation was *unintentional*. Respondents and the United States maintain that this presumption should apply equally to intentional violations. We disagree. The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe. [Some citations omitted.]

The state argues that the federal courts have no business refereeing a contest between two state agencies, IPAS and the state hospital administration; and it is true in general that "federal courts should not get involved unnecessarily in what may be intramural struggles of state government even if invited to do so by one of the contenders." *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845, 848 (7th Cir. 1985); see also *Cronson v. Clark*, 810 F.2d 662 (7th Cir. 1987); *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985); *Donelon v. Louisiana Division of Administrative Law ex rel. Wise*, 522 F.3d 564, 568 (5th Cir. 2008). But this is not a typical case. That it is a suit between state agencies is an accident. If Indiana like most states had appointed a private entity to be IPAS and if the defendant were a private hospital, the suit would be between two private entities.

Independent as it is of the governor and the attorney general, IPAS is a state entity in name only, especially in a suit against a state hospital—there it's an agent of the *federal* government, suing to assure a state's compliance with the federal duties of care for the mentally ill that the state agreed to perform. It would be strange if a state could render the federal statute unenforceable by creating (or appointing) a public rather than a private protection and advocacy agent, or if the statute were unenforceable against state hospitals even though there is (as I think we all agree) no issue of state sovereign immunity.

One would like to know *why* Congress granted states a choice between a public and a private

watchdog agency, why the minority of states (eight out of 50) that have chosen the public option have done so, and what the consequences of the choice are. Besides Indiana, the public option has been chosen by Alabama, Connecticut, Indiana, Kentucky, New York, North Dakota, Ohio, and Virginia (also American Samoa and Puerto Rico). See U.S. Dep't of Health & Human Services, Substance Abuse & Mental Health Services Administration, "Protection and Advocacy for Individuals with Mental Illness (PAIMI) Program" (Feb. 2003), http://mentalhealth.samhsa.gov/cmhs/p&a/about.asp (visited Mar. 26, 2010). I don't know what these eight states have in common and why they made the choice they did. I do know that New York began with a private enforcer but switched to a public one in 1980, having decided that the private enforcer wasn't doing a good job. Patricia Puritz & Mary Ann Scali, "Beyond the Walls: Improving Conditions of Confinement for Youth in Custody" 30 (U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention Report Jan. 1998), www.ncjrs.gov/pdffiles/164727.pdf (visited Mar. 31, 2010). North Carolina switched the other way in 2007. North Carolina Dept. of Administration, "Carolina Legal Assistance Designated as North Carolina's Protection and Advocacy System," May 21, 2007, www.doa.state.nc.us/pio/news/showrelease.asp?id=0001-21MAY07 (visited Mar. 31, 2010). These examples do not suggest a pertinent difference between public and private protection and advocacy agencies. Rather they suggest that a state that

hasn't had a good experience with a public agency is likely to try a private one next, and vice versa.

The secondary literature suggests—ironically in light of the present case—that public protection and advocacy agencies have an easier time gaining access to information from the state than private ones do. Melissa Bowman, Note, "Open Debate Over Closed Doors: The Effect of the New Developmental Disabilities Regulations on Protection and Advocacy Programs," 85 *Ky. L.J.* 955, 990 (1997). The main argument against public agencies—and again it is ironic in light of this case—is that they can't be expected to be "truly independent and withstand political pressure either to not initiate an investigative action or to prematurely resolve an investigation that should be litigated." *Id.* Another argument against the public agency is that private ones may receive charitable donations to augment their resources but people rarely make a charitable donation to a public agency. None of these differences suggests that IPAS has a more limited right to sue than a private agency.

EASTERBROOK, *Chief Judge*, dissenting. My colleagues' approach to this case is in the spirit of the maxim: "Where there is a right, there must be an effective remedy." Indiana has failed to implement federal requirements that go with grants that the state has accepted, and the state is resisting efforts to enforce the federal statutes directly. The prospects of a funding cutoff or a suit by the national government are not effective enough, in my colleagues' assessment, so the court creates an additional remedy.

That approach was common in the era of *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). But it was disavowed in *Cort v. Ash*, 422 U.S. 66 (1975). Today remedies depend on the statutory text and structure, not on judges' views about how much enforcement, and by whom, is optimal. Moreover, the maxim that a right implies a remedy applies only when there *is* a "right." The statutes in question do not confer rights on the plaintiff.

Indiana would not violate anyone's rights by turning down the federal money and disbanding Indiana Protection and Advocacy Services. The federal statute imposes conditions on a grant. A state that wants the money must fulfil the conditions. Such a state-federal contract creates third-party beneficiaries (such as Advocacy Services and the patients), but the Supreme Court has held that these third-party beneficiaries are not entitled to enforce the contract directly. See *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008); *Gonzaga University v. Doe*, 536 U.S. 273 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001). The contract is enforced by the federal agency, which can end the funding or sue if the state does not keep its part of the bargain.

One reason why a state's decision to accept a grant does not imply a third-party right to litigate is the Supreme Court's clear-statement doctrine:

> Congress has broad power to set the terms on which it disburses federal money to the States, see, *e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 206–207 (1987), but when Congress attaches

> conditions to a State's acceptance of federal funds, the conditions must be set out "unambiguously," see *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981); [*Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982)] at 204, n. 26. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract," and therefore, to be bound by "federally imposed conditions," recipients of federal funds must accept them "voluntarily and knowingly." *Pennhurst*, 451 U.S., at 17. States cannot knowingly accept conditions of which they are "unaware" or which they are "unable to ascertain." *Ibid.* Thus, in the present case, we must view the [federal statute] from the perspective of a state official who is engaged in the process of deciding whether the State should accept [the] funds and the obligations that go with those funds.

Arlington Central School District v. Murphy, 548 U.S. 291, 296 (2006). When Congress extends a lure to state governments, the conditions must be express; otherwise the state is buying a pig in a poke.

Nothing in 42 U.S.C. §§ 10801–51 alerts Indiana that, by taking the money, it agrees to be sued in federal court by its own agency, Indiana Protection and Advocacy Services. Section 105, 42 U.S.C. §10805, bears the caption "[s]ystem requirements"; it does not mention patients' rights or authorize the "system" to file suit in federal court. Section 103, 42 U.S.C. §10803, says that the Secretary may contract with states that "meet the requirements of section

105", which reiterates the point that the statute sets conditions on a grant rather than establishing personal rights.

Even if we were to treat "system requirements" the same as "system rights", nothing in either §105 or §106 says that systems have a right to sue states in federal court. (Reading "shall" in §105 as "has a right to", which my colleagues think appropriate, does not overcome the statute's lack of a right to sue states. And treating "shall" as "has a right to" produces some mighty odd constructions. I invite the reader to run through §105 and §106, replacing each "shall" with "has a right to". For example, §105(a)(10) says that a system "shall . . . not use allotments . . . in a manner inconsistent with section 14404 of this title." Replacing "shall" with "has a right to" turns this rule on its head. It is far better to use "shall" to denote obligation rather than entitlement.)

What's more, nothing in the statute creates a personal remedy of any kind. To the contrary, 42 U.S.C. §10851(a) says that the statute "shall not be construed as establishing any new rights for individuals with mental illness." Without a remedy, there cannot be an implied private right of action. See *Gonzaga University*, 536 U.S. at 284.

What a state anticipates when it accepts a federal grant is that enforcement rests in the hands of the grantor, which can either turn off the spigot or sue in its own name—for, as long as the contract lasts, the federal government is entitled to compliance. See *Barnes v. Gorman*, 536 U.S. 181, 187 (2002). But the

Department of Health and Human Services has neither cut off the money nor sued to enforce the contract. To subject the state to any other remedy is to transgress the principle that only clearly articulated conditions may be enforced against state recipients of federal funds.

One explicit federal right of action sometimes can be used to implement the conditions of federal grants: 42 U.S.C. §1983 authorizes suits when the defendant is a state actor and the conditions are specific enough to be enforced as rules of law. See *Maine v. Thiboutot*, 448 U.S. 1 (1980). I am content to assume that the requirements of 42 U.S.C. §§ 10805 and 10806 meet that standard. Four other courts of appeals have held this. *Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction Services*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.); *Pennsylvania Protection & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.); *Missouri Protection & Advocacy Services v. Missouri Department of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1272 (10th Cir. 2003). But Advocacy Services is part of Indiana and so is not a "person" within the scope of §1983. *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). Forty-two states created their advocacy agencies as private entities, which could take advantage of *Thiboutot*. Indiana did not. Because plaintiff is not a "person," it can't use §1983. See also *Illinois v. Chicago*, 137 F.3d 474, 477 (7th Cir. 1998).

Advocacy Services contends, with the support of the United States as *amicus curiae*, that, because it relies on federal funds, it isn't "really" part of Indiana and therefore can use §1983. The argument that an entity is "not the state" if its funding is federal was made and roundly rejected in *Regents of University of California v. Doe*, 519 U.S. 425 (1997). Indiana Protection and Advocacy Services is part of the state, whose governor appoints a third of the Board (see 42 U.S.C. §15044(a)(2); Ind. Code §12-28-1-6(a)). (No one else appoints any member; the Governor's appointees initially chose the rest of the board, which since has picked its own members other than the Governor's selections.) Advocacy Services has the same powers as other state agencies to make administrative rules, Ind. Code §12-28-1-12(7), and its employees are civil servants, *id.* at §12-28-1-12(2). Its offices are in state buildings, and its web site (http://www.in.gov/ipas/) is part of Indiana's; the site's header is the name and picture of Indiana's governor. It is the organization chart rather than sources of funds that distinguishes the states from other kinds of entities. (And if this is wrong, and federal funding means that Advocacy Services is "not the state," then Advocacy Services would be a federal instrumentality, and again not a "person" under §1983.)

Thus §1983 is unavailable. Is there an alternative source of authority to sue?

One possibility is that a right of action may be implied directly from the substantive federal statute, without the need for aid from §1983. But the Supreme Court's cases do not support that approach.

The closest is *Cannon v. University of Chicago*, 441 U.S. 677 (1979). It is not enough, for three reasons.

First, the defendant in *Cannon* was a private organization, so the clear-statement requirement did not apply.

Second, the Court's rationale was that, when enacting Title IX of the Education Amendments of 1972, Congress relied on decisions creating private rights of action, using pre-*Cort* law, under a different statute. 441 U.S. at 694–703. Title IX is a pre-*Cort* statute; the Justices were unwilling to frustrate reliance interests that underlay it. Justices Stewart and Rehnquist, whose votes were essential to the majority in *Cannon*, wrote separately to make it clear that the legislative reliance on pre-*Cort* law was essential to the outcome. 441 U.S. at 717–18. But no one contends that, when it enacted 42 U.S.C. §§ 10801–51 more then a decade after *Cort*, Congress relied on decisions allowing state agencies to sue their own states; there are no such decisions.

Third, *Cannon* observed that the plaintiff was a member of a special class for whose benefit the statute was enacted. 441 U.S. at 689–94. Advocacy Services is not a member of any class supposed to receive a benefit from the federal legislation; it is an ombudsman designed to provide assistance to patients. Advocacy Services wants information that it may be able to use to make suggestions for improving Indiana's mental-health-care system. That is a long distance from the model of personal rights that was vital to the disposition in *Cannon*.

The remit of an administrative agency such as Advocacy Services does not affect anyone's "personal" rights—and the Court has stated repeatedly that a private right of action will be implied only when necessary to vindicate *the plaintiff's* personal rights. E.g., *Thiboutot* (deprivation of the plaintiff's welfare benefits); *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) (plaintiff's right to be free of retaliatory discharge). By contrast, "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Sandoval*, 532 U.S. at 289 (internal quotation omitted).

My colleagues (both the majority opinion and the concurring opinion) believe that Advocacy Services should be allowed to sue precisely because it is *not* trying to vindicate its own rights. It is an advocate for the mentally disabled, and my colleagues think that it should occupy a privileged position as a protector of others. That policy argument might be a sound one, yet the Supreme Court has held that a private right of action will be implied from a funding statute only when necessary so that the litigant may vindicate his or her *personal* rights. Perhaps my colleagues will persuade the Justices to change their doctrine, but under existing doctrine a personal right is essential.

Indeed, under existing doctrine a personal right often is not sufficient even when the federal statute is unconditional (that is, not tied to a grant). E.g., *Thompson v. Thompson*, 484 U.S. 174 (1988) (no

implied private right of action to enforce Parental Kidnapping Prevention Act of 1980); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (no implied private right of action to enforce the Investment Advisers Act of 1940). Since *Cort* the Justices have never created a private right of action on behalf of anyone other than a private person trying to vindicate statutory rights enacted for his personal benefit. Advocacy Services is not in that category.

My colleagues say that the federal statute has given "rights" directly to Advocacy Services. Yet any rights in §105 or §106 are for the benefit of patients, not "systems." Advocacy Services is not trying to improve its own mental health! What's more, these statutes do not create rights; they create duties. As I have already mentioned, the statute calls the subsections in §105 "requirements." They are obligations laid on a grant's recipient—that is, on Indiana, not on Advocacy Services. Indiana may have a duty to confer rights on Advocacy Services, but §105 does not confer any rights directly. Nothing in the statute gives any entitlement to any "system" established under the Act; instead the statute tells the state what conditions it must meet to be eligible for federal funds (and to drive the point home §10851(a) says that the statute does not add to patients' rights).

The only thing looking remotely like a "right" held by an agency to which funds are routed—and the provision on which the majority principally relies (pages 21–22)—is the exhaustion requirement in §107(a), 42 U.S.C. §10807(a). This subsection

provides that, before filing suit, the "system" must exhaust any other remedies. My colleagues say that this "provision would have little purpose if protection and advocacy systems . . . were not empowered to sue" (page 22). Not at all. Section 107(a) speaks of filing suit "on behalf of a [sic] individual with mental illness". A "system" may sue on behalf of mentally ill persons, whose own entitlements supply the right of action, see 42 U.S.C. §§ 10804(c), 10805(a)(1)(C), but the current proceeding is by Advocacy Services on its own behalf and so is outside of §107(a). And there is a more general problem: the majority's approach turns a precondition to suit (that's what an exhaustion requirement is) on someone else's behalf into an *authorization* to sue on one's own behalf.

The transmutation is unwise. The proposition that §107(a) has "little purpose" if it doesn't authorize a system to sue on its own behalf is hyperbole. Section 107(a) serves many functions. First, §107(a) applies to suits that systems file on behalf of persons with disabilities. Second, if §107(a) applies at all to suits by systems in their own names, it covers litigation in state court. Third, it applies to suits filed under §1983 by private "systems" (which, recall, exist in 42 states). Fourth, it applies to suits that public systems file against private defendants, which are not protected by the Supreme Court's clear-statement principle. We should treat §107(a) as what it purports to be: a restriction on litigation rather than a backhanded grant of authority to sue. Section 107(a) assuredly is not the "clear statement" required by *Arlington Central* and similar decisions.

A few words are in order about *Ex parte Young*, 209 U.S. 123 (1908). Now that we are sitting en banc, and thus more willing than a panel to create a conflict, I accept my colleagues' view that *Young* (read in connection with *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002)) overcomes any sovereign-immunity defense. I therefore join my colleagues in disagreeing with *Virginia v. Reinhard*, 568 F.3d 110 (4th Cir. 2009). But to say that a claim against a state officer sidesteps sovereign immunity is not enough; plaintiffs still need a right of action. Most suits to which *Young* applies rest on §1983; in *Verizon*, 47 U.S.C. §252(e)(6) supplied an express right of action; Advocacy Services lacks any equivalent.

Brunner illustrates my point. The Help America Vote Act of 2002 requires state officials to take specific steps to ensure that all persons entitled to vote are properly registered, while other names are purged from the rolls. The statute applies, however, only to states that accept federal grants that defray the cost of meeting the federal objectives. See 42 U.S.C. §15301. Ohio took the federal money but, according to plaintiffs in a §1983 suit filed under *Ex parte Young* against Ohio's Secretary of State, failed to perform its obligations. As a result, plaintiffs contended, invalid votes would be counted.

The district court entered an order directing the Secretary of State to comply with §303 of the Act, 42 U.S.C. §15483(a)(5)(B)(i) (2000 ed. Supp. V), which requires the state's election officials to "match information in the database of the statewide voter registration system with information in the database

of the [state's] motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration." The court of appeals affirmed, holding that §303 establishes rights that can be enforced under §1983 and that judicial relief was essential to ensure a reliable election. 544 F.3d 711 (6th Cir. 2008) (en banc).

Everything that my colleagues say about 42 U.S.C. §§ 10805 and 10806 was true about 42 U.S.C. §15483(a)(5)(B)(i). Each statute establishes specific responsibilities for states that take the federal money. Each state balked at carrying out its obligations. Each plaintiff used *Ex parte Young* to sidestep sovereign immunity. Each suit sought prospective relief rather than damages. Each plaintiff wanted a systemic improvement rather than the vindication of person-specific entitlements. Other ways of enforcing each statute appeared to be ineffectual; neither federal agency revoked the grant or filed suit to enforce the conditions. And *Brunner* was easier for the plaintiff, which was not part of the state and so could invoke §1983 as the right of action. Yet the Supreme Court reversed—unanimously and summarily.

Observing that §303 is a condition on a federal grant and not a free-standing entitlement, the Supreme Court cited *Gonzaga University* and *Sandoval* for the proposition that the plaintiff could not obtain interlocutory relief even if the state was clearly violating §303. In other words, the suit was doomed, so the plaintiff lost even on the assumption that irreparable injury was certain to occur. The

opinion in *Brunner* was one paragraph long. The Supreme Court's point was simple. My point is equally simple—and, to repeat, this case is *weaker* for the plaintiff than was *Brunner*, because Advocacy Services is a state agency that can't use §1983.

Not so, my colleagues say, because this statute lacks something present for the Help America Vote Act (and the statutes at issue in *Gonzaga University* and *Sandoval*): an administrative enforcement process. Without one, there won't be enough enforcement (pages 29–30), "unfair" or "counterproductive" results will ensue (pages 16–17, 31), and the federal courts must step in. As I said at the outset, that is the method of *Borak*, a method that the Justices repudiated in 1975. Congress, not the judiciary, decides whether enforcement via litigation is essential. But the majority's premise also is not correct. There *is* an administrative enforcement process. The Secretary of Health and Human Services has established one by regulation. 42 C.F.R. §51.10, incorporating the procedures of 45 C.F.R. Part 74 and 42 C.F.R. Part 50. The administrative mechanism may or may not be optimal—my colleagues think that it isn't, because it operates only against the "system" (page 30 n.12)—but that decision is for Congress, the President, and the Secretary to make; a court ought not declare that more is required and then establish an enforcement mechanism of its own design.

Both the majority opinion and the concurring opinion express a belief that statutes such as this one should not be enforced by terminating grants. "[C]utting off one's nose to spite one's face", the

concurrence puts it at page 39. This reflects a fundamental disagreement with the Supreme Court, which has held that the principal and often exclusive method of enforcing conditions on federal grants is by funding curtailments. Perhaps my colleagues have a wise view as a matter of policy, but the Supreme Court's perspective is the one we must use in a hierarchical judicial system. I don't think that the Justices' perspective can be avoided by saying that Gonzaga University was an offender, while Advocacy Services is a vindicator of rights. That won't distinguish *Brunner*. And the vindicator/violator line misses the point that the threat of funding cutoffs is what induces violators such as Gonzaga University to conform. Deterrence is not limited to the criminal law. There would be even more reason for these institutions to comply if federal courts could award damages or issue injunctions, but *Brunner*, *Gonzaga University*, and *Sandoval* curtail that option.

The concurring opinion expresses confidence that an injunction is superior to the threat of administrative funding cutoff because then "[t]he state and the federal government would be playing a game of chicken—with Indiana's mentally ill citizens the victims of any collision that might result" (page 39). Put to one side the fact that the Secretary of Health and Human Services is not limited to yanking the grant; she can sue to enforce the grant's conditions. Suppose that the Secretary's only lever were cash. Why should we think that it is *only* the Secretary who plays chicken with the state? Indiana tells us that it cares deeply about whether it is subject to suit in federal court by Advocacy Services.

Our affirmative answer may lead Indiana to reject the grant and send Advocacy Services' staff to the unemployment line. It is not possible to say that the Secretary's levers commence a game of chicken while the judiciary's levers don't. At least the Secretary can *negotiate* with Indiana to find a satisfactory solution. All the judicial branch can do is issue judgments. Once we have issued ours, everything is in Indiana's hands, and if we drive the state to end this program there is nothing we can do to bring it back again.

If the Secretary passes out federal money without enforcing the conditions, that's unfortunate, but it is hard to see how it can be called "unfair" to anyone other than the federal taxpayers. The Secretary has ample means to ensure that the federal dollars are not wasted. And the majority's view that litigation must be authorized, because cutting off funds would be "counterproductive," is impossible to reconcile with *Brunner*, *Gonzaga Uni*versity, or *Sandoval*; it would mean that conditions attached to federal grants *always* may be enforced by private litigation—at least if the judges approve the goal of the grant program. The Supreme Court has held otherwise.

Both Indiana Protection and Advocacy Services and Indiana Family and Social Services Administration believe that they have patients' interests at heart, though they disagree about how to serve those interests. Fights between two state agencies should be resolved within the state (including the state's judiciary, if state law so provides), or through the auspices of the Department

of Health and Human Services, which administers the federal grant program. This statute establishes a program of cooperative federalism. Cooperation usually requires negotiation and compromise among multiple public bodies. That is the way of the administrative rather than the judicial process. We should dismiss this suit and let the administrative process take its course.

Supreme Court of the United States

No. 09A1156

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION, ET AL.,

Applicants,

v.

INDIANA PROTECTION AND ADVOCACY SERVICES

O R D E R

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that for the reasons stated in Judge Hamilton's order for the Court of Appeals denying the motion to stay the mandate, the application is denied.

/s/ John Paul Stevens
Associate Justice of the Supreme Court of the United States

Dated this 1st
day of June, 2010

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 26, 2010

Before

DAVID F. HAMILTON, Circuit Judge

No. 08-3183

INDIANA PROTECTION AND ADVOCACY SERVICES,
Plaintiff-Appellee,

v.

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION; ANNE W. MURPHY, in her official capacity as Secretary of the Indiana Family and Social Services Administration; GINA ECKHART, in her official capacity as Director of the Division of Mental Health and Addiction; and LARRY LISAK, in his official capacity as Superintendent of Larue Carter Memorial Hospital,
Defendants-Appellants.

Appeal from the United States District
Court for the Southern District
of Indiana, Indianapolis Division
No. 1:06-cv-1816-LJM-TAB
Larry J. McKinney,
Judge.

ORDER

On April 22, 2010, this court sitting *en banc* affirmed the judgment of the district court as modified. *Indiana Protection and Advocacy Servs. v. Indiana Family and Social Services Admin.*, — F.3d —, 2010 WL 1610117 (7th Cir. Apr. 22, 2010) ("*IPAS II*"). The effect of this court's mandate will be to affirm the district court's order requiring the named state officials to make available to the plaintiff certain records regarding a mentally ill patient (identified in the court records and the court's opinion as Patient 1) for inspection and copying.

The defendants intend to seek Supreme Court review and have moved to stay the mandate pending the conclusion of that Court's review. The plaintiff opposes the motion. All participating judges agree that the motion should be denied.[1] The district court has stayed its order pending resolution of this appeal. As I explain below as author of the merits opinion, this court sees no reason to delay the mandate or to prevent the district court from lifting its stay of its order pending possible Supreme Court review.

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[1] Judge Tinder has not participated in consideration of this appeal.

A party seeking a stay of a mandate pending resolution of a petition for a writ of certiorari must show that the petition will present a substantial question and that there is good cause for a stay. See Fed. R. App. P. 41(d)(2)(A); *Books v. City of Elkhart*, 239 F.3d 826, 827 (7th Cir. 2001) (Ripple, J., in chambers) (granting stay where mandate would require permanent and expensive removal of stone monument on lawn of municipal building). The grant of a motion to stay the mandate "is far from a foregone conclusion." 16AA Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Catherine T. Struve, *Federal Practice and Procedure* § 3987 (4th ed. 2008). Instead, the party seeking the stay must demonstrate both a reasonable probability of success on the merits and irreparable injury absent a stay. See *Bricklayers Local 21 v. Banner Restoration, Inc.*, 384 F.3d 911, 912 (7th Cir. 2004) (Ripple, J., in chambers); *Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (per curiam); *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers).

To demonstrate a reasonable probability of success on the merits of the proposed certiorari petition, the applicant must show a reasonable probability that four Justices will vote to grant certiorari and a "fair prospect" that five Justices will vote to reverse the judgment of this court. See *California v. American Stores Co.*, 492 U.S. 1301, 1306-07 (1989) (O'Connor, J., in chambers); see also *United States v. Warner*, 507 F.3d 508, 511 (7th Cir.2007) (Wood, J., in chambers); *Williams*, 50 F.3d at 1360. In resolving the applicants' motion to stay, we consider the issues that the applicants plan to

raise in the certiorari petition in the context of the case history, the Supreme Court's treatment of other cases presenting similar issues, and the considerations that guide the Supreme Court in determining whether to issue a writ of certiorari. See *Williams*, 50 F.3d at 1361.

This court decided three questions that the defendants intend to ask the Supreme Court to review. First, all participating members of this court agreed that the Eleventh Amendment does not bar the plaintiff from seeking injunctive and declaratory relief against the individual state officials in their official capacities. Our decision disagreed on this point with a decision by the Fourth Circuit, *Virginia v. Reinhard*, 568 F.3d 110 (4th Cir. 2009), cert. petition pending, No. 09-529. Such a direct circuit split provides a reasonably promising possibility for certiorari review.[2]

Second, a majority of this court held that the plaintiff has a right to sue under the PAIMI Act for injunctive and declaratory relief to obtain access to the records in question. This case appears to be the first one in which that specific question has been decided, though many other cases in circuit and district courts have assumed such a right under PAIMI and similar protection and advocacy statutes. See *IPAS II*, — F.3d at —, 2010 WL 1610117, at *13

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[2] On May 25, 2010, defendants filed a letter under Circuit Rule 28(j) attaching the Solicitor General's invited response in Virginia arguing that the Supreme Court should grant certiorari relying on, among other points, the conflict with our decision. The Rule 28(j) submission does not change the analysis of the pending motion.

(collecting cases). One member of this court disagreed, indicating that there is room for reasonable disagreement on the point, though there is currently no direct circuit split.

Third, this court held that the peer review records in dispute were subject to the record access provisions of the PAIMI. We are the fifth circuit to have decided the issue, and all circuits are in agreement. See, *e.g.*, *Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction & Advocacy Servs.*, 448 F.3d 119, 128 (2d Cir. 2006) (Sotomayor, J.); *Missouri Protection & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021, 1023 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1270 (10th Cir. 2003); *Pennsylvania Protection & Advocacy, Inc., v. Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.). However, a 1999 decision by the New Hampshire Supreme Court stands in opposition. See *Disabilities Rights Center, Inc. v. New Hampshire Department of Corrections*, 732 A.2d 1021 (N.H. 1999). In spite of this apparent outlier, with all circuits in agreement this question does not appear to be promising for certiorari review.

The defendants argue there is good cause for a stay of the mandate because they will suffer irreparable harm in the form of an "invasion of privacy" if they are required to allow the plaintiff to inspect and copy the disputed peer review records regarding Patient 1. However, the defendants fail to specify their basis for any privacy right or interest in the records under dispute. Does it lie with Patient 1? With the state care-giving institutions? With the

doctors and other medical professionals who rendered treatment? In any case, to alleviate that concern, the plaintiff points out that if and when it is granted access to the records, it still will be required by law to maintain the confidentiality of those records. There is therefore little to no risk that the information the records contain would be publicly disclosed or that the information would be used for some purpose unrelated to the plaintiff's mandate, severely undercutting the defendants' argument. Also, this negligible risk is outweighed by the plaintiff's interest in carrying out its obligation to protect and advocate on behalf of other mentally ill patients. That interest has been necessarily kept in suspense for the last several years of this litigation, and further delay is unwarranted.

In sum, the balance weighs against granting a stay of the mandate even if there is a reasonable possibility that certiorari may be granted. The disclosure of information would be to an independent government agency with its own legal obligations to maintain the confidentiality of the documents in question. The plaintiff has had to wait nearly four years after Patient 1's death for access to the peer review documents, stymying its ability to effectively protect and advocate on behalf of other individuals with mental illness. There will be no invasion of Patient 1's privacy, for Patient 1 is deceased. Whatever interests the caregiving entities or the doctors and other individual care-givers might have in the privacy of information about their treatment of Patient 1 will be adequately protected by the plaintiff's own legal obligations of confidentiality. Under these circumstances, a court order allowing

the plaintiff access to the records but reserving the right to order the plaintiff to return all copies and derivative notes in the event that this court's decision is reversed would give substantial protection to the defendants. Finally, as the defendants point out, that ongoing prospect for ordering return of documents would also prevent the case from becoming moot pending possible Supreme Court review. See *Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992). Accordingly, the motion to stay the mandate is denied.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 10, 2009

By the Court:[*]

INDIANA PROTECTION AND ADVOCACY SERVICES,
Plaintiff-Appellee,

No. 08-3183 v.

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION, *et al.*,
Defendants-Appellants.

Appeal from the United
States District Court for the
Southern District of Indiana,
Indianapolis Division.
No. 1:06-cv-LJM-TAB
Larry J. McKinney, *Judge.*

Order

The petition for rehearing en banc is granted, and the panel's opinion and judgment are vacated.

The briefing schedule is as follows:

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[*] Circuit Judge Tinder did not participate in the consideration or decision of this case.

Opening brief for appellants December 16, 2009
Brief for appellee January 15, 2010
Reply brief for appellants January 29, 2010

The briefs must be received by the Clerk on these dates; Fed. R. App. P. 26(c) does not apply.

The en banc court will not consult the parties' original briefs, supplemental memoranda after argument to the panel, and filings seeking or opposing rehearing en banc. These new briefs must cover all issues that the parties and *amici curiae* deem pertinent.

Briefs for any *amicus curiae* will be accepted within 7 days after the principal brief of the party being supported.

Oral argument will be held after the briefs have been exchanged. The date of argument will be set by separate order.

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-3183

INDIANA PROTECTION AND ADVOCACY SERVICES,

Plaintiff-Appellee,

v.

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:06-cv-1816-LJM-TAB—Larry J. McKinney, *Judge.*

ARGUED JANUARY 20, 2009
DECIDED JULY 28, 2009

Before EASTERBROOK, *Chief Judge*, SYKES, Circuit Judge, and KENDALL, *District Judge.*[*]

EASTERBROOK, *Chief Judge.* Each state that accepts federal grants under the Developmental Disabilities Assistance and Bill of Rights Act must establish "a system to protect and advocate the

[*] Of the Northern District of Illinois, sitting by designation.

rights of individuals with developmental disabilities." 42 U.S.C. §15043. A second statute, the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801–51 (PAIMI), provides extra funding for systems established under §15043. A system that receives money under §10803 is entitled to investigate "incidents of abuse and neglect of individuals with mental illness" (§10805(a)(1)(A)) and, to carry out its investigations, to see patient-care records, unless a legal guardian is in charge of the patient's interests. 42 U.S.C. §§ 10805(a)(4), 10806. Indiana has taken the federal grants. Its system is called Indiana Protection and Advocacy Services ("Advocacy Services" for short).

Advocacy Services asked for records about J.Y.G., a mentally disabled patient at LaRue Carter Memorial Hospital. J.Y.G. had died, and Advocacy Services wanted to learn whether she was a victim of abuse, so that it could propose improvements in medical procedures. The Hospital, a part of the state, see Ind. Code §12-7-2-184, declined to furnish all of the records that Advocacy Services wanted. Some of them are covered by state privacy protections, the Hospital asserted, and the disclosure of others would violate the privacy interests of J.Y.G.'s parents. Advocacy Services then filed this suit in federal court, naming as defendants not only the Hospital but also the Indiana Family and Social Services Administration (which superintends the Hospital), plus several state officials. The district court held that defendants must hand over the records, because J.Y.G. was an adult at the time of death and her parents had not been appointed as her legal guardians. The absence of a guardian brought J.Y.G.

within the scope of Advocacy Services' authority under §10805(a)(4) and 42 C.F.R. §51.2, the commentary to which says that parents are deemed guardians of minor children but not of adult children, unless the parents are appointed to that role by a court.

Defendants (collectively "Indiana") contend on appeal that the regulation is invalid and that parents should be treated as guardians of their (mentally disabled) adult as well as their minor children, whether or not a court appoints them to that role. If J.Y.G.'s parents were her guardians, then Advocacy Services needs their consent. Disclosure without consent, Indiana maintains, would violate the parents' constitutional and statutory rights.

Underneath this apparently simple dispute lies a bushel full of issues that the parties did not mention in the district court, or this court. For example: How does Advocacy Services, which describes itself as an ombudsman rather than a law-enforcement agency, have standing to obtain information that pertains to J.Y.G.? What is Advocacy Services' injury? (The answer may be that the lack of information is injury in itself; this argument has carried the day under the Freedom of Information Act, and we need not decide whether it applies to §10805 and §10806 too.) Conversely, why is Indiana entitled to assert the privacy interests of J.Y.G.'s parents? They can speak for themselves. It is not as if Advocacy Services wanted to rummage through the parents' diaries. The medical records are already in the possession of state government, and allowing another state agency

to see them differs from disclosing them to the public, which Advocacy Services is forbidden to do. 42 U.S.C. §10806(a), (b). Cf. *Bowen v. Roy*, 476 U.S. 693 (1986).

Then there is the question whether Advocacy Services is entitled to sue in federal court. Neither federal statute gives "systems" an express right of action. These statutes are enacted under the Spending Clause, and the usual way in which such laws are enforced is by withholding grants from states that do not satisfy the conditions. See *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008); *Gonzaga University v. Doe*, 536 U.S. 273 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001). Cf. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). In response to a request for supplemental briefs, Advocacy Services and the United States (as amicus curiae) have argued that §§ 10805 and 10806 are specific enough to create personal rights that are enforceable through litigation, under the approach of *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), and *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987). And four courts have held that these statutes create specific federal rights—though none of the four cites *Wilder*, *Wright*, *Gonzaga*, or *Alexander*. See *Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction Services*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.); *Pennsylvania Protection & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000) (Alito, J.); *Missouri Protection & Advocacy Services v. Missouri Department of Mental Health*, 447 F.3d

1021 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1272 (10th Cir. 2003).

All four of these decisions assume that, if the rights in §§ 10805 and 10806 are specific, then they must be enforceable in federal court. But this begs an important question. Usually statutes that induce state cooperation through the lure of federal grants leave to states the implementation of the grant's conditions. See *South Dakota v. Dole*, 483 U.S. 203 (1987). The Protection and Advocacy for Individuals with Mental Illness Act may or may not follow that approach—yet another question that the parties have not addressed. The statutory language is equivocal. Section 10805(a)(1), for example, says that the system "shall . . . have the authority to . . . investigate incidents of abuse" and obtain records. The word "shall" in such a construction could mean that the national government bestows these powers on any "system" that receives a federal dime. Or it could mean that, to qualify for a grant, the state "shall" ensure that the system can do all of the listed things. That's the norm for strings attached to federal grants. Yet the parties' supplemental briefs agree that Indiana has not enacted legislation, or promulgated regulations, giving Advocacy Services the powers listed in §§ 10805 and 10806.

Private rights of action to enforce spending legislation are derived through 42 U.S.C. §1983 and the approach of *Maine v. Thiboutot*, 448 U.S. 1 (1980). Section 1983 authorizes federal courts to enforce statutes, as well as the Constitution, against misbehaving state actors. The Supreme Court concluded in *Wilder* and *Wright* that spending

statutes that contain personal rights come within §1983, as understood in *Thiboutot*. But Advocacy Services is unable to use §1983, because Advocacy Services is *itself* a state actor, and thus not a "person" for the purpose of §1983. See *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). Only "persons" can sue under §1983, and the upshot of this is that §1983 cannot be used by one branch of a state to sue another. See *Illinois v. Chicago*, 137 F.3d 474 (7th Cir. 1998). Yet that is exactly what Advocacy Services is trying to do. This suit might as well be captioned "Indiana v. Indiana." *Virginia Office for Protection and Advocacy v. Reinhard*, 405 F.3d 185 (4th Cir. 2005) (*Virginia I*), holds that a "system" established under §15043 cannot sue another state agency in federal court to enforce §10805 or §10806. We agree with that conclusion, which means that the other issues we have identified need not be resolved. (There is no priority among reasons for deciding that a suit does not belong in federal court. See *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007). Any one reason not to decide the merits will do, even if some of the unresolved issues are jurisdictional.)

Advocacy Services denies that it is suing under §1983. It contends that the claim arises directly under federal law—§§ 10805 and 10806. This does not help, because those sections lack a right of action. It is hard to see where the right of action comes from, if not §1983. That's why *Wright* and *Wilder* both relied on *Thiboutot*. So the fact that Advocacy Services is not a "person" is conclusive against this federal action. Indiana might have

established its "system" as a private entity, the way legal services corporations are organized. See 42 U.S.C. §10805(c). Some other states have done this.† But because Advocacy Services is a public agency rather than a private corporation or foundation, it cannot use §1983 and must sue in state rather than federal court.

The eleventh amendment provides another obstacle to a federal-court action. The Supreme Court understands this amendment to cover suits based on federal law. *Hans v. Louisiana*, 134 U.S. 1 (1890). Occasionally Congress has specified that a federal law supersedes states' sovereign immunity. The Supreme Court has recognized two such instances: statutes enforcing the fourteenth

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† Wisconsin is among them. See *Disability Rights Wisconsin, Inc. v. Wisconsin Department of Public Instruction*, 463 F.3d 719, 722 (7th Cir. 2006), which describes Wisconsin's system as a "nonprofit stock corporation". Our opinion held that a protection and advocacy system is entitled to information without consent by affected persons. The opinion assumed that there is a right of action under federal law and that relief is proper against a state agency. None of the briefs contested those matters, and as they do not affect subject-matter jurisdiction the panel was not obliged to address them on its own. See *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) (existence of a private right of action is not a jurisdictional question); *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002) (ability of states to waive the defense of sovereign immunity shows that the issue is not jurisdictional). Moreover, even if these subjects were jurisdictional, the fact that they have been overlooked does not establish a holding on the subject. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91–92 (1998); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952).

amendment, see *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and statutes implementing the bankruptcy power, see *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006). But Advocacy Services does not contend that this litigation rests on §5 of the fourteenth amendment or the bankruptcy clause. Statutes implementing other clauses, including the commerce and spending powers, remain subject to the eleventh amendment. See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). A state's decision to accept federal funds is not enough, standing alone, to waive the state's immunity from suit, see *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246–47 (1985). Congress occasionally insists that states submit to suit as a condition on the receipt of federal money, see, e.g., 42 U.S.C. §2000d–7, but Advocacy Services does not contend that any of the statutes under which it operates requires such a waiver or that Indiana has otherwise consented to be sued in federal court on the claim in this litigation.

Plaintiffs often step around the eleventh amendment by seeking prospective relief against state officials who disregard federal statutes. See *Ex parte Young*, 209 U.S. 123 (1908). That won't work for claims against the Hospital and the Indiana Family and Social Services Administration, which are parts of the State of Indiana rather than officeholders. Advocacy Services has not invoked *Ex parte Young* even with respect to the three natural persons it has named as defendants, because it wants a remedy for a concrete injury, not an injunction governing public officials' future conduct. The Supreme Court has held that the eleventh amendment applies to a plaintiff's efforts to obtain a

turnover order for property in a state's possession (at least when the state has a "colorable claim" to a possessory interest). See, e.g., *California v. Deep Sea Research*, Inc., 523 U.S. 491 (1998), and *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (both collecting cases). Yet that's the sort of remedy Advocacy Services wants. See also *Virginia Office for Protection and Advocacy v. Reinhard*, 2009 U.S. App. LEXIS 11737 (4th Cir. June 2, 2009) (*Virginia II*), at *14–31 (*Ex parte Young* does not permit "systems" to obtain information from state agencies).

Because Advocacy Services wants information, the Supreme Court's treatment of intellectual-property claims is informative. And the Court held in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), that the eleventh amendment blocks enforcement of patent claims against states and their agencies. We do not see any reason why patent holders should be turned away on grounds of sovereign immunity while other demands concerning information in state hands would be unaffected by that doctrine.

And we add, as did *Virginia II*, that the Supreme Court has never used *Ex parte Young* to let one arm of a state sue another. For private parties affected by states' failure to implement federal law, prospective equitable relief using the legal fiction that the defendant "isn't really the state" may be the only recourse. Intramural disputes among governmental bodies can and should be worked out in political ways—or through the state courts, if a state chooses that method of dispute resolution.

Some future decision will need to wrestle with the problems that arise when a "system" established as a private organization sues in federal court to obtain information from a private medical provider, or when a "system" sues its home state in state court. This suit, between one state agency and another, is outside the scope of §1983 and blocked by the eleventh amendment. The judgment of the district court is vacated, and the case is remanded with instructions to dismiss for want of jurisdiction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA PROTECTION AND ADVOCACY SERVICES,
Plaintiff,

vs.

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION, et al.,
Defendants.

1:06-cv-1816-LJM-TAB

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The parties in this cause, plaintiff, Indiana Protection and Advocacy Services ("IPAS"), and defendants, Indiana Family and Social Services Administration ("IFSSA"), Mitch Roob, in his official capacity as Secretary of the Family and Social Services Administration, Cathy Boggs, in her official capacity as Director of the Division of Mental Health and Addiction, Lisa K. Kellum ("Kellum"), in her official capacity as Superintendent of LaRue Memorial Hospital ("LaRue") (defendants, collectively, "Defendants"), have stipulated to many of the relevant facts and claim that the Court should enter judgment in their favor as a matter of law pursuant to Federal Rule of Civil Procedure 56 ("Rule 56").

For the reasons stated herein, the Court **GRANTS** summary judgment in favor of IPAS and **DENIES** summary judgment in favor of Defendants.

I. BACKGROUND

The undisputed and stipulated facts are these:

A. THE PARTIES

IPAS was established by the State of Indiana to administer and operate the Protection and Advocacy for Individuals with Mental Illness Act of 1986 (the "PAIMIA"), which was enacted to establish independent protection and advocacy ("P&A") systems nationwide. *See* Ind. Code § 12-28- 1-1 *et seq.*; *see also* 42 U.S.C. §§ 10801(b)(2)(A) & (B). The PAIMIA gives IPAS the authority to protect and to advocate for the rights of individuals with mental illness "through activities to ensure the enforcement of the Constitution and Federal and State statutes" and by investigating "incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred." 42 U.S.C. §§ 10801(b)(2)(A) & (B).

Defendant LaRue is a state institution as defined by Indiana Code § 12-7-2-184 and is administered by the Indiana Division of Mental Health and Addiction ("DMA"). Ind. Code § 12-24- 1-3. LaRue provides overnight care and treatment to individuals with mental illness.

Defendants represent the interests of two mentally ill patients, J.Y.G. ("Client 1"), who had LaRue patient case number 17455, and J.F. ("Client 2"), who had LaRue patient case number 17127. The specific involvement of each defendant in each patient case is described below.

B. STATUTORY FRAMEWORK

Congress expressly codified the purpose of the PAIMIA:

(a) The Congress finds that—

(1) individuals with mental illness are vulnerable to abuse and serious injury;

(2) family members of individuals with mental illness play a crucial role in being advocates for the rights of individuals with mental illness where the individuals are minors, the individuals are legally competent and choose to involve the family members, and the individuals are legally incompetent and the legal guardians, conservators, or other legal representatives are members of the family;

(3) individuals with mental illness are subject to neglect, including lack of treatment, adequate nutrition, clothing, health care, and adequate discharge planning; and

(4) State systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate.

(b) The purposes of this chapter are—

(1) to ensure that the rights of individuals with mental illness are protected; and

(2) to assist States to establish and operate a protection and advocacy system for individuals with mental illness which will—

(A) protect and advocate the rights of such individuals through activities to ensure the enforcement of the Constitution and Federal and State statutes; and

(B) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.

42 U.S.C. § 10801.

Along with the authority to investigate incidents of abuse and neglect of individuals with mental illness, the PAIMIA give IPAS the authority to access all records of—

(A) any individual who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access;

(B) any individual (including an individual who has died or whose whereabouts are unknown)—

(I) who by reason of the mental or physical condition of such individual is unable to authorize the system to have such access;

(ii) who does not have a legal guardian, conservator, or other legal representative, or for whom the legal guardian is the State; and

(iii) with respect to whom a complaint has been received by the system or with respect to whom as a result of monitoring or other activities (either of which result form a complaint or other evidence) there is probable cause to believe that such individual has been subject to abuse or neglect; and

(C) any individual with a mental illness, who has a legal guardian, conservator, or other legal representative, with respect to whom a complaint has been received by the system or with respect to whom there is probable cause to believe the health or safety of the individual is in serious and immediate jeopardy, whenever—

(I) such representative has been contacted by such system upon receipt of the name and address of such representative;

(ii) such system has offered assistance to such representative to resolve the situation; and

(iii) such representative has failed or refused to act on behalf of the individual . . . .

42 U.S.C. § 10805(a)(1) & (4).

C. CLIENT 1

Client 1 was admitted to LaRue on June 21, 2006, and was admitted to Wishard Memorial Hospital ("Wishard") from LaRue on June 27, 2006. Stip. ¶¶ 1-2. On July 31, 2006, Client 1 died at Wishard. *Id.* ¶ 3.

On or about July 31, 2006, IPAS received a report from a professional staff member employed by LaRue that Client 1 had expired. Owens Aff. ¶ 2.

On August 11, 2006, a mortality review committee met at LaRue regarding Client 1's death and its report was transcribed on August 28, 2006. Stip. ¶ 4.

On or about August 30, 2006, IPAS Advocacy Specialist, Peggy Ann Owens ("Owens"), requested a copy of Client 1's complete chart held at LaRue. Id. ¶ 5. Owens' request was made by letter to Jay Wenning ("Wenning"), Director of Health Information Services at LaRue. *Id.* The letter stated, in part, that if IPAS did not receive a copy of the chart or there was no response by September 11, 2006, IPAS would assume that LaRue did not intend to comply with the request. *Id. See also* Owens Aff. Ex. A.

Also on August 30, 2006, Owens reviewed Client 1's chart that was located at LaRue. Owen Aff. ¶ 4.

On or about September 1, 2006, Kathy Gregory ("Gregory"), Deputy Chief Counsel for the DMA, notified IPAS that Client 1 had parents who had

been active in her case and, as next of kin, had not signed a release of Client 1's medical records. Stip. ¶ 6. However, there is no record that prior to her death, Client 1 had a court-appointed guardian, power of attorney or health care representative. *Id.*

On or about September 13, 2006, Owens sent a second letter to Wenning this time requesting a copy of the mortality review committee report and the root cause analysis report that were done after Client 1's death. *Id.* ¶ 7; Owens Aff. ¶ 6. This letter stated, in part, that if IPAS did not receive the requested reports or if there was no response by September 19, 2006, IPAS would assume that LaRue did not intend to comply with the letter. Owens Aff. Ex. C. Also on that date, Owens reviewed Client 1's chart that was located at LaRue. *Id.* ¶ 7.

On or about September 14, 2006, Gregory notified Owens at IPAS that IPAS could not receive copies of the requested reports concerning Client 1's death. Stip. ¶ 8.

D. CLIENT 2

Client 2 was initially admitted to LaRue in November 2003. Stip. ¶ 9. At the times relevant to this dispute Client 2 resided on Unit 3A at LaRue; Client 2 is still a resident of the hospital. Id.

Client 2 requested services from IPAS sometime in September 2006 concerning his treatment at LaRue. Owens Aff. Ex. D. As part of the intake process, Owens received a "Request to Release Information" form ("the release") that was signed by

Client 2. *Id.* The release requested that LaRue release to Owens, or other representative of IPAS, any and all records pertaining to Client 2 for the purpose of advocacy. *Id.*

On or about October 13, 2006, by email to Eric Heeter ("Heeter"), Adult Services Division Director at LaRue, Owens requested a copy of the investigation of Client 2's consumer grievance and a copy of the incident report concerning a certain matter related to Client 2. Stip. ¶ 10; Owens Aff. Ex. E. In the email, Owens stated: "If you are unable to do this, please notify me via e-mail by the end of business on Tuesday 10/17/06." Owens Aff. Ex. E. On or about the same day, Heeter responded that he could not provide an incident report "per organization policy." Owens Aff. Ex. E.

However, on or about October 18, 2006, via email, Heeter replied to Owens and explained the sequence of events and LaRue's response. Stip. ¶ 11. Also on or about that date, Owens received an email from Kellum, Superintendent at LaRue, stating that it was "not appropriate at any time to ask for a copy of the Incident Reports [sic]. Those are internal documents only and are never to be copied or distributed." Owens Aff. Ex. F.

II. SUMMARY JUDGMENT STANDARD

To paraphrase the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action.

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). *See also United Ass'n of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1267-68 (7th Cir. 1990). Motions for summary judgment are governed by Federal Rule of Civil Procedure 56 (c) ("Rule 56(c)"), which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). *See also Nat'l Athletic Sportswear, Inc. v. Westfield Ins. Co.*, 528 F.3d 508, 512 (7th Cir. 2008). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Nat'l Athletic Sportswear*, 528 F.3d at 512. It is not the duty of the Court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of

identifying the evidence upon which it relies. *See Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (stating that the non-movant must "'do more than simply show that there is some metaphysical doubt as to the material facts.'" (quoting *Waukesha Foundry, Inc. v. Indus. Eng'g, Inc.*, 91 F.3d 1002, 1007 (7th Cir. 1996))); *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005).

In evaluating a motion for summary judgment, the Court draws all reasonable inferences from undisputed facts in favor of the nonmoving party and views the disputed evidence in the light most favorable to the nonmoving party. *See Springer*, 518 F.3d at 483-84; *Nat'l Athletic Sportswear*, 528 F.3d at 512. The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. See *Anderson*, 477 U.S. at 248; *Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007); *Anders v. Waste Mgmt. of Wis.*, 463 F.3d 670, 675 (7th Cir. 2006).

III. DISCUSSION

A. ISSUES REGARDING THE RECORDS OF CLIENT 1

In moving for summary judgment IPAS alleges that LaRue's denial of Owens' request for the records of Client 1 amounts to a failure by LaRue to provide IPAS with reasonable access to records in violation of the PAIMIA. Defendants assert that the PAIMIA

does not require them to give IPAS Client 1's records because IPAS failed to get consent of Client 1's parents. In addition, Defendants contend that they were justified in not giving IPAS the peer review and root cause analysis documents regarding LaRue's investigation into Client 1's death because they were analytical investigation documents not covered by the PAIMIA, and because of confidentiality concerns.

The first issue is whether the PAIMIA requires Defendants to give copies of records maintained by IFSSA or LaRue about Client 1 to IPAS without Client 1's parents' consent. The Court concludes that the relevant statute requires that IPAS be given the records after probable cause is found if the IPAS client does not have a court-appointed guardian, conservator or other legal guardian.

When approaching an issue of statutory interpretation like the one at issue here, the Court begins with the plain wording of the relevant statutory provision. *See Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 445 (7th Cir. 2006). In doing so, the Court must "'assume that [a term's] plain meaning accurately expresses the legislative purpose.'" *United States v. Misc. Firearms, Explosives, Destructive Devices & Ammunition*, 376 F.3d 709, 712 (7th Cir. 2004), *cert. denied sum nom., Flischli v. United States*, 544 U.S. 1019 (2005), (quoting *Grzan v. Charter Hosp. of Nw. Ind.*, 104 F.3d 116, 122 (7th Cir. 1997)). Moreover, in order to ascertain the plain meaning of a term, the Court looks at "the specific language at issue, the context in which the language is used, and the broader context of the statute as a whole." *Id.* (citing

Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)). The Court may "not construe a statute in a way that makes words or phrases meaningless, redundant or superfluous." *Id.* (citing *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1272 (7th Cir. 1993)).

The term "legal representative" is not defined by the PAIMIA; however, the term is defined in the Code of Federal Regulations:

> Legal Guardian, Conservator, and Legal Representative all mean an individual whose appointment is made and regularly reviewed by a State court or agency empowered under State law to appoint and review such officers, and having authority to consent to health/mental health care or treatment of an individual with mental illness. It does not include persons acting only as a representative payee, persons acting only to handle financial payments, attorneys or persons acting on behalf of an individual with mental illness only in individual legal matters, or officials responsible for the provision of health or mental health services to an individual with mental illness, or their designees.

42 C.F.R. § 51.2. Likewise, in its commentary to the final rule that appeared in the Federal Register on October 15, 1997, the U.S. Department of Health and Human Services (the "DH&HS") clarified this definition noting that "legal guardian for the purposes of this regulation is an individual who is appointed by the appropriate State powers to be a legal guardian for the individual and who has the authority to consent to health/mental health care or

treatment for the individual with mental illness." Requirements Applicable to Prot. & Advocacy of Individuals with Mental Illness, 62 Fed. Reg. 53,548, 53,552 (Oct. 15, 1997) (to be codified at 42 C.F.R. pt. 51). With respect to minor children, the DH&HS stated that "natural or adoptive parents are legal guardians unless the State has appointed another legal guardian under applicable State law." *Id.* Giving full effect to the DH&HS' interpretation of the PAIMIA, then, would mean that, for adult children, the legal representative is "an individual whose appointment is made and regularly reviewed by a State court or agency . . . ." 42 C.F.R. § 51.2.

In addition, although Congress explicitly recognizes the importance of the family to the protection of and advocacy for persons with mental illnesses in the PAIMIA, it expressly differentiated "legal guardian, conservator or legal representative" from a family member when describing the role of the family under the PAIMIA:

> [F]amily members of individuals with mental illness play a crucial role in being advocates for the rights of individuals with mental illness where the individuals are minors, the individuals are legally competent and choose to involve the family members, and the individuals are legally incompetent and the legal guardians, conservators, or other legal representatives are members of the family . . . .

42 U.S.C. § 10801(a)(2). In other words, Congress provides a role for the family as advocates of adult children who are legally competent only when the

individual has chosen to involve them, and for adult children who are legally incompetent only when "the legal guardians, conservators, or other legal representatives are members of the family . . . ." In light of this language, a construction of the term "legal representative" to include the parents of adult children would eliminate Congress' intent to include a parent as an advocate of such individuals only when they have been appointed by the relevant state agency or court and are subject to ongoing oversight in some way. Such a construction does not obliterate the family as advocates for mentally ill adults; rather it confirms the role of the State agency, like IPAS, as an advocate for mentally ill adults in addition to the family.

The Court has construed the term "legal representative" to mean a State agency or court-appointed guardian, conservator or health care representative. The parties have stipulated that Client 1 had no such legal representative. Stip. ¶ 6. Therefore, pursuant to the terms of the PAIMIA, Defendants should have given copies of Client 1's records to IPAS.

Defendants contend that a construction that eliminates obtaining agreement from a parent to access a deceased mental patient's records is unconstitutional. Specifically, Defendants assert that it violates the requirement of notice and an opportunity to be heard under the Due Process Clause and/or it violates a parent's rights over their children as well as the parents' right to privacy. The Court fails to see the similarity between the situations in the cases cited by Defendants and the

protection of mentally ill patients by a federally-mandated and state-created agency. The most similar case, *Stanley v. Illinois*, 405 U.S. 645 (1972), in which the Supreme Court found unconstitutional an Illinois statute that eliminated an unwed father from the definition of parent because it denied him a hearing, involved the definition of the term "parent." Clearly the term "parent" can include an unwed father. However, it is not equally clear that the term "legal representative" includes a parent in the context of the PAIMIA. Rather, the plain meaning of the term is something different than "parent," even in the context of the PAIMIA.

Likewise, the Court is unpersuaded by Defendants' argument that excluding consent of the parents under the PAIMIA violates the liberty interest of the parent to the "care, custody, and control of their children . . . ." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). In *Troxel* the Supreme Court addressed the rights of parents vis-a-vis minor children. There is nothing in the language of *Troxel* or similar cases that focuses on the rights of parents over adult children. In fact, individuals over the age of eighteen are adults, with the rights of adults. Mental illness or residency in a state facility for treatment for such illness does not take away those adult rights just because a parent is involved in the eighteen-year-old's life. Moreover, this is not a case where the statute gives broad power to IPAS to investigate any incident that occurs involving a mentally ill individual. Rather, the PAIMIA limits IPAS' role to situations where "there is probable cause to believe that such individual has been subject to abuse or neglect . . . ." 42 U.S.C. §

10805(a)(1). This limitation ensures that IPAS is only allowed access to a patient's records in the most egregious of circumstances. The Court cannot see how the failure to notify or seek permission from an adult's parent would violate the parent's due process rights.

Finally, Defendants assert that IPAS has no authority under the PAIMIA to obtain access to the peer review committee report or the root cause analysis regarding Client 1. Specifically, Defendants argue that these documents are not "reports" or "records" as that term is defined by the PAIMIA. In addition, Defendants contend that even if they could be considered reports or records under the PAIMIA, the federal statute does not preempt Indiana state law, which renders peer review committee reports confidential and privileged. See Ind. Code § 34-30-15-1.

IPAS asserts that both peer review committee reports and root cause analyses are included in the documents to which PAIMIA grants IPAS access. IPAS also argues that nothing in Indiana Code § 34-30-15-1 prohibits Defendants from supplying the peer review committee report to IPAS because such disclosure is not a breach as that term is used in the statute. Moreover, IPAS asserts that even if Indiana Code § 34-30-15-1 could prohibit disclosure, the PAIMIA preempts that statute.

The plain meaning of "records" and the agency regulations implementing PAIMIA support IPAS' view that peer review committee reports and root

cause analyses are included in that definition. The PAIMIA defines "report" to

> include[] reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records.

42 U.S.C. § 10803. According to the plain language of first phrase of this section, reports prepared to investigate incidents at a covered facility are included in the scope of documents to which IPAS should have access. In addition, the regulation that implements this statute specifically provides for IPAS' access to "investigative findings." 42 C.F.R. § 51.41(c)(1)(iv). It is clear that both peer review committee reports and root cause analyses are "investigative findings;" therefore, the term "record" would encompass both types of documents. As a result, the Court concludes that, under these provisions of PAIMIA, IPAS is entitled to access the peer review committee reports and the root cause analysis in Defendants' possession regarding Client 1.

The Court also concludes that, while Indiana Code § 34-30-15-1 does not prohibit Defendants from supplying the peer review committee report to IPAS, it does not mandate such disclosure. As such, it seems to be in conflict with the provision of the PAIMIA that a "system established under section

10803 of the Act shall have access to all records." 42 U.S.C. § 10805(a)(4). Specifically, Indiana Code § 34-30-15-1 states, in relevant part:

> (f) Upon its determination, the governing body of a hospital may report, as part of the hospital's quality assessment and improvement program, a determination of a peer review committee of the hospital regarding an adverse event concerning patient care to the state department of health or another state agency without:
>
> (1) violating this section; or
>
> (2) waiving the confidentiality and privilege attached to the communications, proceedings, records, determinations, or deliberations of the peer review committee.

Ind. Code § 34-30-15-1. Thus, while IPAS is correct that the Indiana scheme allows for disclosure of peer review committee reports to a state agency like IPAS, the language of the statute is permissive, meaning a hospital could choose not to do so. In that case, IPAS contends that it has the right to access these records or reports and, for that determination, the Court must turn to the language of the PAIMIA.

As stated above, the language of the PAIMIA concerning the ability of IPAS to access records of a mentally ill patient is mandatory. 42 U.S.C. § 10805(a)(4). Defendants' arguments that peer review reports are not "records" under the PAIMIA because of the language of 42 C.F.R. § 51.41(c), which provides examples of what is included in a "record"

but states "except that nothing is this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees," have been rejected by the Second, Third, Eighth, and Tenth Circuit Courts of Appeals. *See Prot. & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006); *Pa. Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000); *Mo. Prot. & Advocacy Servs. v. Mo. Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Ctr. for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10th Cir. 2003). In essence, the Courts of Appeals have concluded that the language of the access provision of the PAIMIA is clear that a protection and advocacy service is entitled to obtain peer review reports, notwithstanding any contrary agency regulation. This Court adopts the reasoning of the Second Circuit on this issue as set forth in *Protection and Advocacy for Persons with Disabilities, Connecticut v. Mental Health and Addiction Services*, 448 F.3d at 125-28.

On the question of preemption, this Court concludes that the PAIMIA preempts Indiana's statute regulating access to peer review reports to the extent that it can be read to allow a hospital to determine whether or not to disclose the information after a legitimate request by IPAS. In other words, under the PAIMIA, disclosure of such records is not discretionary, it is mandatory in instances where the PAIMIA's disclosure provisions are triggered. As discussed above, Indiana Code § 34-30-15-1 allows a hospital's governing body to make its own determination about whether or not to disclose peer review reports. This is in direct conflict with the

language of the PAIMIA, which states that IPAS "shall have access to all records." 42 U.S.C. § 10805(a)(4). Congress has specifically spoken to the rights of IPAS to access records in the face of contrary state law:

> (C) If the laws of a State prohibit an eligible system from obtaining access to records of individuals with mental illness in accordance with section 10805(a)(4) of this title and this section, section 10805(a)(4) of this title and this section shall not apply to such system before—
>
> (I) the date such system is no longer subject to such a prohibition; or
>
> (ii) the expiration of the 2-year period beginning on May 23, 1986, whichever occurs first.

42 U.S.C. § 10805(a)(4). Therefore, the federal scheme applies regardless of the state law restricting access, and IPAS is entitled to obtain the peer review reports regarding Client 1.[1]

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[1] The Court notes that Defendants' concern that IPAS may not keep the peer review committee report confidential is without merit. The PAIMIA specifically requires IPAS to keep confidential the information it receives in connection with its duties under the PAIMIA, including from the patient. 42 U.S.C. § 10806(a). Moreover, no appeals process provided to the patient for wrongful withholding of the information would allow the individual to receive information like the peer review committee report to which he or she was not otherwise entitled. *See* 42 U.S.C. § 10806(b)(1); 42 C.F.R. §§ 164.524(a)(A)(3) & (4); Ind. Code § 16-39-2-4.

In summary, the Court has concluded that, in the context of the PAIMIA, the term "legal representative" does not automatically include the parent of an adult child; therefore, IPAS is entitled to obtain copies of Client 1's records from Defendants. In addition, the Court has concluded that IPAS is entitled to all records in Defendants' possession, including any peer review committee reports or root cause analyses that were done regarding Client 1.

B. ISSUE REGARDING THE RECORDS OF CLIENT 2

Defendants had refused to provide IPAS with the incident reports regarding Client 2's complaint. On page thirteen of their brief, Defendants concede that these types of reports are a "record" for purposes of the PAIMIA; therefore, summary judgment in favor of IPAS on this issue is appropriate.

IV. CONCLUSION

For the reasons stated herein, the Court **GRANTS** plaintiff's, Indiana Protection and Advocacy Services, Motion for Summary Judgment, and **DENIES** defendants', Indiana Family and Social Services Administration, Mitch Roob, in his official capacity as Secretary of the Family and Social Services Administration, Cathy Boggs, in her official capacity as Director of the Division of Mental Health and Addiction, Lisa K. Kellum, in her official capacity as Superintendent of LaRue Memorial Hospital, Motion for Summary Judgment.

IT IS SO ORDERED this 28th day of July, 2008.

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution attached.

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STATUTORY PROVISIONS

Protection and Advocacy for Individuals with Mental Illness Act

42 U.S.C. § 10801. Congressional findings and statement of purpose

(a) The Congress finds that—

(1) individuals with mental illness are vulnerable to abuse and serious injury;

(2) family members of individuals with mental illness play a crucial role in being advocates for the rights of individuals with mental illness where the individuals are minors, the individuals are legally competent and choose to involve the family members, and the individuals are legally incompetent and the legal guardians, conservators, or other legal representatives are members of the family;

(3) individuals with mental illness are subject to neglect, including lack of treatment, adequate nutrition, clothing, health care, and adequate discharge planning; and

(4) State systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate.

(b) The purposes of this chapter are—

Reinsurance makes no sense(1) to ensure that the rights of individuals with mental illness are protected; and

(2) to assist States to establish and operate a protection and advocacy system for individuals with mental illness which will—

(A) protect and advocate the rights of such individuals through activities to ensure the enforcement of the Constitution and Federal and State statutes; and

(B) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.

42 U.S.C. § 10802. Definitions

For purposes of this subchapter:

(1) The term "abuse" means any act or failure to act by an employee of a facility rendering care or treatment which was performed, or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused, or may have caused, injury or death to a[1] individual with mental illness, and includes acts such as—

---

[1] The United States Code and the United States Code Annotated both note that this should probably be "an." They footnote every instance, we are only marking this first instance.

(A) the rape or sexual assault of a individual with mental illness;

(B) the striking of a individual with mental illness;

(C) the use of excessive force when placing a individual with mental illness in bodily restraints; and

(D) the use of bodily or chemical restraints on a individual with mental illness which is not in compliance with Federal and State laws and regulations.

(2) The term "eligible system" means the system established in a State to protect and advocate the rights of per-sons with developmental disabilities under subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000.

(3) The term "facilities" may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons.

(4) The term "individual with mental illness" means, except as provided in section 10804(d) of this title, an individual—

(A) who has a significant mental illness or emotional impairment, as determined by a mental health professional qualified under the laws and regulations of the State; and

(B)(i)(I) who is an inpatient or resident in a facility rendering care or treatment, even if the whereabouts of such inpatient or resident are unknown;

(II) who is in the process of being admitted to a facility rendering care or treatment, including persons being transported to such a facility; or"; [FN2]

(III) who is involuntarily confined in a municipal detention facility for reasons other than serving a sentence resulting from conviction for a criminal offense; or

(ii) who satisfies the requirements of subparagraph (A) and lives in a community setting, including their own home.

(5) The term "neglect" means a negligent act or omission by any individual responsible for providing services in a facility rendering care or treatment which caused or may have caused injury or death to a individual with mental illness or which placed a individual with mental illness at risk of injury or death, and includes an act or omission such as the failure to establish or carry out an appropriate individual program plan or treatment plan for a individual with mental illness, the failure to provide adequate nutrition, clothing, or health care to a individual with mental illness, or the failure to provide a safe environment for a individual with mental illness, including the failure to maintain adequate numbers of appropriately trained staff.

(6) The term "Secretary" means the Secretary of Health and Human Services.

(7) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(8) The term "American Indian consortium" means a consortium established under part C of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6042 et seq.).[2]

42 U.S.C. § 10803. Allotments

The Secretary shall make allotments under this subchapter to eligible systems to establish and administer systems—

(1) which meet the requirements of section 10805 of this title; and

(2) which are designed to—

(A) protect and advocate the rights of individuals with mental illness; and

---

[2] The United States Code and United States Code Annotated note that this should probably read "(42 U.S.C. § 15042 et seq.)".

(B) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.

*****

42 U.S.C. § 10805. System requirements

(a) Authority; independent status; access to facilities and records; advisory council; annual report; grievance procedure

A system established in a State under section 10803 of this title to protect and advocate the rights of individuals with mental illness shall—

(1) have the authority to—

(A) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred;

(B) pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State; and

(C) pursue administrative, legal, and other remedies on behalf of an individual who—

(i) was a individual with mental illness; and

(ii) is a resident of the State,

but only with respect to matters which occur within 90 days after the date of the discharge of such individual from a facility providing care or treatment;

(2) be independent of any agency in the State which provides treatment or services (other than advocacy services) to individuals with mental illness;

(3) have access to facilities in the State providing care or treatment;

(4) in accordance with section 10806 of this title, have access to all records of—

(A) any individual who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access;

(B) any individual (including an individual who has died or whose whereabouts are unknown) –

(i) who by reason of the mental or physical condition of such individual is unable to authorize the system to have such access;

(ii) who does not have a legal guardian, conservator, or other legal representative, or for whom the legal guardian is the State; and

(iii) with respect to whom a complaint has been received by the system or with respect to whom as a result of monitoring or other activities (either of which result from a complaint or other evidence) there is probable cause to believe that such individual has been subject to abuse or neglect; and

(C) any individual with a mental illness, who has a legal guardian, conservator, or other legal representative, with respect to whom a complaint has been received by the system or with respect to whom there is probable cause to believe the health or safety of the individual is in serious and immediate jeopardy, whenever—

(i) such representative has been contacted by such system upon receipt of the name and address of such representative;

(ii) such system has offered assistance to such representative to resolve the situation; and

(iii) such representative has failed or refused to act on behalf of the individual;

(5) have an arrangement with the Secretary and the agency of the State which administers the State plan under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.] for the furnishing of the information required by sub-section (b) of this section;

(6) establish an advisory council—

(A) which will advise the system on policies and priorities to be carried out in protecting and advocating the rights of individuals with mental illness;

(B) which shall include attorneys, mental health professionals, individuals from the public who are knowledge-able about mental illness, a provider of mental health services, individuals who have received or are receiving mental health services, and family members of such individuals, and at least 60 percent the membership of which shall be comprised of individuals who have received or are receiving mental health services or who are family members of such individuals; and

(C) which shall be chaired by an individual who has received or is receiving mental health services or who is a family member of such an individual;

(7) on January 1, 1987, and January 1 of each succeeding year, prepare and transmit to the Secretary and the head of the State mental health agency of the State in which the system is located a report describing the activities, accomplishments, and expenditures of the system during the most recently completed fiscal year, including a section prepared by the advisory council that describes the activities of the council and its assessment of the operations of the system;

(8) on an annual basis, provide the public with an opportunity to comment on the priorities established by, and the activities of, the system;

(9) establish a grievance procedure for clients or prospective clients of the system to assure that individuals with mental illness have full access to the services of the system and for individuals who have received or are receiving mental health services, family members of such individuals with mental illness, or representatives of such individuals or family members to assure that the eligible system is operating in compliance with the provisions of this subchapter and subchapter III of this chapter; and

(10) not use allotments provided to a system in a manner inconsistent with section 14404 of this title.

(b) Annual survey report; plan of corrections

The Secretary and the agency of a State which administers its State plan under title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.] shall provide the eligible system of the State with a copy of each annual survey re-port and plan of corrections for cited deficiencies made pursuant to titles XVIII and XIX of the Social Security Act [42 U.S.C.A. §§ 1395 et seq. and 1396 et seq.] with respect to any facility rendering care or treatment to individuals with mental illness in the State in which such system is located. A report or plan shall be made available within 30 days after the completion of the report or plan.

(c) Governing authority

(1)(A) Each system established in a State, through allotments received under section 10803 of this title, to protect and advocate the rights of individuals with mental illness shall have a governing authority.

(B) In States in which the governing authority is organized as a private non-profit entity with a multi-member governing board, or a public system with a multi-member governing board, such governing board shall be selected according to the policies and procedures of the system. The governing board shall be composed of—

(i) members (to be selected no later than October 1, 1990) who broadly represent or are knowledgeable about the needs of the clients served by the system; and

(ii) in the case of a governing authority organized as a private non-profit entity, members who broadly represent or are knowledgeable about the needs of the clients served by the system including the chairperson of the advisory council of such system.

As used in this subparagraph, the term "members who broadly represent or are knowledgeable about the needs of the clients served by the system" shall be construed to include individuals who have received or are receiving mental health services and family members of such individuals.

(2) The governing authority established under paragraph (1) shall—

(A) be responsible for the planning, design, implementation, and functioning of the system; and

(B) consistent with subparagraph (A), jointly develop the annual priorities of the system with the advisory council.

42 U.S.C. § 10806. Access to records

(a) Confidentiality

An eligible system which, pursuant to section 10805(a)(4) of this title, has access to records which, under Federal or State law, are required to be maintained in a confidential manner by a provider of mental health services, shall, except as provided in subsection (b) of this section, maintain the confidentiality of such records to the same extent as is required of the provider of such services.

(b) Disclosure

(1) Except as provided in paragraph (2), an eligible system which has access to records pursuant to section 10805(a)(4) of this title may not disclose information from such records to the individual who is the subject of the information if the mental health professional responsible for supervising the provision of mental health services to such individual has provided the system with a written determination that disclosure of such information to such individual would be detrimental to such individual's health.

(2)(A) If disclosure of information has been denied under paragraph (1) to an individual—

(i) such individual;

(ii) the legal guardian, conservator, or other legal representative of such individual; or

(iii) an eligible system, acting on behalf of an individual described in subparagraph (B),

may select another mental health professional to review such information and to determine if disclosure of such information would be detrimental to such individual's health. If such mental health professional determines, based on professional judgment, that disclosure of such information would not be detrimental to the health of such individual, the system may disclose such information to such individual.

(B) An eligible system may select a mental health professional under subparagraph (A)(iii) on behalf of—

(i) an individual whose legal guardian is the State; or

(ii) an individual who has a legal guardian, conservator, or other legal representative other than the State if such guardian, conservator, or representative does not, within a reasonable time after such individual is denied access to information under paragraph (1), select a mental health

professional under subparagraph (A) to review such in-formation.

(C) If the laws of a State prohibit an eligible system from obtaining access to the records of individuals with mental illness in accordance with section 10805(a)(4) of this title and this section, section 10805(a)(4) of this title and this section shall not apply to such system before—

(i) the date such system is no longer subject to such a prohibition; or

(ii) the expiration of the 2-year period beginning on May 23, 1986,

whichever occurs first.

(3)(A) As used in this section, the term "records" includes reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records.

(B) An eligible system shall have access to the type of records described in subparagraph (A) in accordance with the provisions of subsection (a) of this section and paragraphs (1) and (2) of subsection (b) of this section.

42 U.S.C. § 10807. Legal actions

(a) Administrative remedies

Prior to instituting any legal action in a Federal or State court on behalf of a [FN1] individual with mental illness, an eligible system, or a State agency or nonprofit organization which entered into a contract with an eligible sys-tem under section 10804(a) of this title, shall exhaust in a timely manner all administrative remedies where appropriate. If, in pursuing administrative remedies, the system, agency, or organization determines that any matter with respect to such individual will not be resolved within a reasonable time, the system, agency, or organization may pursue alternative remedies, including the initiation of a legal action.

(b) Exception

Subsection (a) of this section does not apply to any legal action instituted to prevent or eliminate imminent serious harm to a individual with mental illness.

Developmental Disabilities Assistance and Bill of Rights Act

42 U.S.C. § 15041. Purpose

The purpose of this part is to provide for allotments to support a protection and advocacy system (referred to in this part as a "system") in each State to protect the legal and human rights of individuals with developmental disabilities in accordance with this part.

42 U.S.C. § 15042. Allotments and payments

(a) Allotments

(1) In general

To assist States in meeting the requirements of section 15043(a) of this title, the Secretary shall allot to the States the amounts appropriated under section 15045 of this title and not reserved under paragraph (6). Allotments and reallotments of such sums shall be made on the same basis as the allotments and reallotments are made under subsections (a)(1)(A) and (e) of section 15022 of this title, except as provided in paragraph (2).

(2) Minimum allotments

In any case in which—

(A) the total amount appropriated under section 15045 of this title for a fiscal year is not less than

$20,000,000, the allotment under paragraph (1) for such fiscal year—

(i) to each of American Samoa. Guam, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands may not be less than $107,000; and

(ii) to any State not described in clause (i) may not be less than $200,000; or

(B) the total amount appropriated under section 15045 of this title for a fiscal year is less than $20,000,000, the allotment under paragraph (1) for such fiscal year—

(i) to each of American Samoa, Guam, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands may not be less than $80,000; and

(ii) to any State not described in clause (i) may not be less than $150,000.

(3) Reduction of allotment

Notwithstanding paragraphs (1) and (2), if the aggregate of the amounts to be allotted to the States pursuant to such paragraphs for any fiscal year exceeds the total amount appropriated for such allotments under section 15045 of this title for such fiscal year, the amount to be allotted to each State for such fiscal year shall be proportionately reduced.

(4) Increase in allotments

In any year in which the total amount appropriated under section 15045 of this title for a fiscal year exceeds the total amount appropriated under such section (or a corresponding provision) for the preceding fiscal year by a percentage greater than the most recent percentage change in the Consumer Price Index published by the Secretary of Labor under section 720(c)(1) of Title 29 (if the percentage change indicates an increase), the Secretary shall increase each of the minimum allotments described in subparagraphs (A) and (B) of paragraph (2). The Secretary shall increase each minimum allotment by an amount that bears the same ratio to the amount of such minimum allotment (including any increases in such minimum allotment under this paragraph (or a corresponding provision) for prior fiscal years) as the amount that is equal to the difference between—

(A) the total amount appropriated under section 15045 of this title for the fiscal year for which the increase in the minimum allotment is being made; minus

(B) the total amount appropriated under section 15045 of this title (or a corresponding provision) for the immediately preceding fiscal year,

bears to the total amount appropriated under section 15045 of this title (or a corresponding provision) for such preceding fiscal year.

(5) Monitoring the administration of the system

In a State in which the system is housed in a State agency, the State may use not more than 5 percent of any allotment under this subsection for the costs of monitoring the administration of the system required under section 15043(a) of this title.

(6) Technical assistance and American Indian consortium

In any case in which the total amount appropriated under section 15045 of this title for a fiscal year is more than $24,500,000, the Secretary shall—

(A) use not more than 2 percent of the amount appropriated to provide technical assistance to eligible systems with respect to activities carried out under this part (consistent with requests by such systems for such assistance for the year); and

(B) provide a grant in accordance with section 15043(b) of this title, and in an amount described in paragraph (2)(A)(i), to an American Indian consortium to provide protection and advocacy services.

(b) Payment to systems

Notwithstanding any other provision of law, the Secretary shall pay directly to any system in a State that complies with the provisions of this part the amount of the allotment made for the State under

this section, unless the sys-tem specifies otherwise.

(c) Unobligated funds

Any amount paid to a system under this part for a fiscal year and remaining unobligated at the end of such year shall remain available to such system for the next fiscal year, for the purposes for which such amount was paid.

42 U.S.C. § 15043. System required

(a) System required

In order for a State to receive an allotment under part B of this subchapter or this part—

(1) the State shall have in effect a system to protect and advocate the rights of individuals with developmental disabilities;

(2) such system shall—

(A) have the authority to—

(i) pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements, with particular attention to members of ethnic and racial minority groups; and

(ii) provide information on and referral to programs and services addressing the needs of individuals with developmental disabilities;

(B) have the authority to investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred;

(C) on an annual basis, develop, submit to the Secretary, and take action with regard to goals (each of which is related to 1 or more areas of emphasis) and priorities, developed through data driven strategic planning, for the system's activities;

(D) on an annual basis, provide to the public, including individuals with developmental disabilities attributable to either physical impairment, mental impairment, or a combination of physical and mental impairment, and their representatives, and as appropriate, non-State agency representatives of the State Councils on Develop-mental Disabilities, and Centers, in the State, an opportunity to comment on--

(i) the goals and priorities established by the system and the rationale for the establishment of such goals; and

(ii) the activities of the system, including the coordination of services with the entities carrying out advocacy programs under the Rehabilitation Act

of 1973 (29 U.S.C. 701 et seq.), the Older Americans Act of 1965 (42 U.S.C. 3001 et seq.), and the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (42 U.S.C. 10801 et seq.), and with entities carrying out other related programs, including the parent training and information centers funded under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), and activities authorized under section 3003 or 3004 of Title 29;

(E) establish a grievance procedure for clients or prospective clients of the system to ensure that individuals with developmental disabilities have full access to services of the system;

(F) not be administered by the State Council on Developmental Disabilities;

(G) be independent of any agency that provides treatment, services, or habilitation to individuals with develop-mental disabilities;

(H) have access at reasonable times to any individual with a developmental disability in a location in which ser-vices, supports, and other assistance are provided to such an individual, in order to carry out the purpose of this part;

(I) have access to all records of—

(i) any individual with a developmental disability who is a client of the system if such individual, or the legal guardian, conservator, or other legal

representative of such individual, has authorized the system to have such access;

(ii) any individual with a developmental disability, in a situation in which—

(I) the individual, by reason of such individual's mental or physical condition, is unable to authorize the system to have such access;

(II) the individual does not have a legal guardian, conservator, or other legal representative, or the legal guardian of the individual is the State; and

(III) a complaint has been received by the system about the individual with regard to the status or treatment of the individual or, as a result of monitoring or other activities, there is probable cause to believe that such individual has been subject to abuse or neglect; and

(iii) any individual with a developmental disability, in a situation in which—

(I) the individual has a legal guardian, conservator, or other legal representative;

(II) a complaint has been received by the system about the individual with regard to the status or treatment of the individual or, as a result of monitoring or other activities, there is probable cause to believe that such individual has been subject to abuse or neglect;

(III) such representative has been contacted by such system, upon receipt of the name and address of such representative;

(IV) such system has offered assistance to such representative to resolve the situation; and

(V) such representative has failed or refused to act on behalf of the individual;

(J)(i) have access to the records of individuals described in subparagraphs (B) and (I), and other records that are relevant to conducting an investigation, under the circumstances described in those subparagraphs, not later than 3 business days after the system makes a written request for the records involved; and

(ii) have immediate access, not later than 24 hours after the system makes such a request, to the records without consent from another party, in a situation in which services, supports, and other assistance are provided to an individual with a developmental disability—

(I) if the system determines there is probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy; or

(II) in any case of death of an individual with a developmental disability;

(K) hire and maintain sufficient numbers and types of staff (qualified by training and experience) to

carry out such system's functions, except that the State involved shall not apply hiring freezes, reductions in force, prohibitions on travel, or other policies to the staff of the system, to the extent that such policies would impact the staff or functions of the system funded with Federal funds or would prevent the system from carrying out the functions of the system under this part;

(L) have the authority to educate policymakers; and

(M) provide assurances to the Secretary that funds allotted to the State under section 15042 of this title will be used to supplement, and not supplant, the non-Federal funds that would otherwise be made available for the purposes for which the allotted funds are provided;

(3) to the extent that information is available, the State shall provide to the system—

(A) a copy of each independent review, pursuant to section 1396a(a)(30)(C) of this title, of an Intermediate Care Facility (Mental Retardation) within the State, not later than 30 days after the availability of such a review; and

(B) information about the adequacy of health care and other services, supports, and assistance that individuals with developmental disabilities who are served through home and community-based waivers (authorized under section 1396n(c) of this title) receive; and

(4) The agency implementing the system shall not be redesignated unless—

(A) there is good cause for the redesignation;

(B) the State has given the agency notice of the intention to make such redesignation, including notice regarding the good cause for such redesignation, and given the agency an opportunity to respond to the assertion that good cause has been shown;

(C) the State has given timely notice and an opportunity for public comment in an accessible format to individuals with developmental disabilities or their representatives; and

(D) the system has an opportunity to appeal the redesignation to the Secretary, on the basis that the redesignation was not for good cause.

(b) American Indian consortium

Upon application to the Secretary, an American Indian consortium established to provide protection and advocacy services under this part, shall receive funding pursuant to section 15042(a)(6) of this title to provide the services. Such consortium shall be considered to be a system for purposes of this part and shall coordinate the services with other systems serving the same geographic area. The tribal council that designates the consortium shall carry out the responsibilities and exercise the authorities specified

for a State in this part, with regard to the consortium.

(c) Record

In this section, the term "record" includes—

(1) a report prepared or received by any staff at any location at which services, supports, or other assistance is provided to individuals with developmental disabilities;

(2) a report prepared by an agency or staff person charged with investigating reports of incidents of abuse or neglect, injury, or death occurring at such location, that describes such incidents and the steps taken to investigate such incidents; and

(3) a discharge planning record.

42 U.S.C. § 15044. Administration

(a) Governing board

In a State in which the system described in section 15043 of this title is organized as a private nonprofit entity with a multimember governing board, or a public system with a multimember governing board, such governing board shall be selected according to the policies and procedures of the system, except that—

(1)(A) the governing board shall be composed of members who broadly represent or are

knowledgeable about the needs of the individuals served by the system;

(B) a majority of the members of the board shall be—

(i) individuals with disabilities, including individuals with developmental disabilities, who are eligible for ser-vices, or have received or are receiving services through the system; or

(ii) parents, family members, guardians, advocates, or authorized representatives of individuals referred to in clause (i); and

(C) the board may include a representative of the State Council on Developmental Disabilities, the Centers in the State, and the self-advocacy organization described in section 15024(c)(4)(A)(ii)(I) of this title;

(2) not more than 1/3 of the members of the governing board may be appointed by the chief executive officer of the State involved, in the case of any State in which such officer has the authority to appoint members of the board;

(3) the membership of the governing board shall be subject to term limits set by the system to ensure rotating membership;

(4) any vacancy in the board shall be filled not later than 60 days after the date on which the vacancy occurs; and

(5) in a State in which the system is organized as a public system without a multimember governing or advisory board, the system shall establish an advisory council—

(A) that shall advise the system on policies and priorities to be carried out in protecting and advocating the rights of individuals with developmental disabilities; and

(B) on which a majority of the members shall be—

(i) individuals with developmental disabilities who are eligible for services, or have received or are receiving services, through the system; or

(ii) parents, family members, guardians, advocates, or authorized representatives of individuals referred to in clause (i).

(b) Legal action

(1) In general

Nothing in this subchapter shall preclude a system from bringing a suit on behalf of individuals with developmental disabilities against a State, or an agency or instrumentality of a State.

(2) Use of amounts from judgment

An amount received pursuant to a suit described in paragraph (1) through a court judgment may only be used by the system to further the purpose of this

part and shall not be used to augment payments to legal contractors or to award personal bonuses.

(3) Limitation

The system shall use assistance provided under this part in a manner consistent with section 14404 of this title.

(c) Disclosure of information

For purposes of any periodic audit, report, or evaluation required under this part, the Secretary shall not require an entity carrying out a program to disclose the identity of, or any other personally identifiable information related to, any individual requesting assistance under such program.

(d) Public notice of Federal onsite review

The Secretary shall provide advance public notice of any Federal programmatic or administrative onsite review of a system conducted under this part and solicit public comment on the system through such notice. The Secretary shall prepare an onsite visit report containing the results of such review, which shall be distributed to the Governor of the State and to other interested public and private parties. The comments received in response to the public comment solicitation notice shall be included in the onsite visit report.

(e) Reports

Beginning in fiscal year 2002, each system established in a State pursuant to this part shall annually prepare and transmit to the Secretary a report that describes the activities, accomplishments, and expenditures of the system during the preceding fiscal year, including a description of the system's goals, the extent to which the goals were achieved, barriers to their achievement, the process used to obtain public input, the nature of such input, and how such input was used.

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No. 10-131

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In The
Supreme Court of the United States

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION; ANNE W. MURPHY, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION; GINA ECKART, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF MENTAL HEALTH AND ADDICTION; LARRY LISAK, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF LARUE CARTER MEMORIAL HOSPITAL, PETITIONERS,

v.

INDIANA PROTECTION AND ADVOCACY SERVICES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment is a bar to this suit by an independent state agency against state officials for prospective injunctive relief to remedy a violation of federal law when petitioners did not raise the Eleventh Amendment issue until briefing before the court of appeals en banc.

2. Whether the Seventh Circuit correctly decided, as a matter of first impression, that the Protection and Advocacy for Individuals with Mental Illness Act, which authorizes Protection and Advocacy Systems to access "all records" and bring lawsuits in federal court, creates a federal cause of action for Protection and Advocacy Systems to enforce their right to access records.

3. Whether the Seventh Circuit correctly decided, consistent with four other courts of appeals, that the Protection and Advocacy for Individuals with Mental Illness Act's authorization to Protection and Advocacy Systems to access "all records" does not implicitly exempt "peer review" records.

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BRIEF IN OPPOSITION

Indiana Protection and Advocacy Services respectfully submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT

A. Statutory Framework

1. Federal law

In response to public reports of deplorable conditions at a New York state institution for persons with intellectual disabilities in the 1970s, Congress enacted legislation creating a federal grant program that paid States to designate entities as Protection and Advocacy Systems dedicated to protecting individuals with disabilities from abuse and neglect. *See* Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 94-103, § 203, 89 Stat. 486, 504 (1975) (codified as amended at 42 U.S.C. § 15001 et seq.); S. Rep. No. 93-1297 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6408-6409.

In 1986, Congress enacted a similar statute to fund Protection and Advocacy Systems focused on protecting individuals with mental illness. *See* Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), Pub. L. No. 99-319, 100 Stat. 478 (1986) (codified as amended at 42 U.S.C. § 10801 et seq.). In express statutory findings, Congress determined that "individuals with mental illness are vulnerable to abuse and serious injury" and that existing "State systems for monitoring compliance

with respect to the rights of individuals with mental illness vary widely and are frequently inadequate." 42 U.S.C. § 10801(a)(1), (a)(4). Congress made clear that it intended the federal funds to assist States in establishing Protection and Advocacy Systems that could engage in "activities to ensure the enforcement of the Constitution and Federal and State statutes." *Id.* § 10801(b)(2)(A).

Congress intended that a Protection and Advocacy System be independent of the State, but Congress gave States flexibility as to how to achieve that goal. Under both federal statutes, to ensure that Protection and Advocacy Systems are effective in investigating abuse or neglect in state-run (as well as private) treatment facilities, Congress provided that the Systems "shall * * * be independent of" any state agencies that provide treatment. *Id.* §§ 15043(a)(2)(G), 10805(a)(2). While a State is free to establish a Protection and Advocacy System either as a "private non-profit entity" or as a state entity, *id.* §§ 15044(a), 10805(c)(1)(B), in either situation, the Governor may appoint no more than one-third of any governing board of a Protection and Advocacy System. *Id.* § 15044(a)(2). Indiana and seven other States have established independent state agencies,[1] while the

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[1] *See* Conn Gen. Stat § 46a-7 et seq.; Ky. Rev. Stat Ann. § 31.010 et seq.; N.Y. Mental Hyg Law § 45 01 et seq.; N D. Cent Code § 25-01.03-01 et seq.; Ohio Rev. Code § 5123 60 et seq , Va. Code § 51.5-39.2A et seq. Alabama's system is established by unpublished Governor's directive.

remaining forty-two States have opted for not-for-profit corporations.

Once a State designates a private non-profit or state entity as its Protection and Advocacy System, it cannot change the nature of the System from private to public (or vice versa) absent "good cause," *id.* § 15043(a)(4)(A), and any such change can be reviewed initially by the federal government at the request of the System, *id.* § 15043(a)(4)(D), and then a federal court, *see Office of the Governor v. Department of Health & Human Servs.*, 997 F.2d 1290, 1292 (9th Cir. 1993).

In addition to authorizing advocacy on behalf of individuals, both statutes anticipate a separate protection role for the system by expressly providing that a Protection and Advocacy System "shall * * * have access" to treatment facilities and "all records." 42 U.S.C. §§ 15043(a)(2)(I), (c), 10805(a)(3), (a)(4). To enforce this right, the statutes confer authority on each system to pursue "legal, administrative, and other appropriate remedies" to ensure the protection of individuals with disabilities or mental illness who are receiving care or treatment in the State. *Id.* §§ 15043(a)(2)(A)(i), 10805(a)(1)(B). The federal statutory right to access records is not contingent on state law. To the contrary, since 1988, Protection and Advocacy Systems have been entitled to records even if "the laws of a State prohibit an eligible system from obtaining access to the records." *Id.* § 10806(b)(2)(C).

2. Indiana Law

a. Indiana established respondent and designated it as its Protection and Advocacy System in 1977. Respondent was established to "secure to the state * * * and Indiana citizens maximum benefits under the Developmentally Disabled Assistance and Bill of Rights Act (P.L. 94-103), and to this end this chapter should be liberally construed." Ind. Code § 12-28-1-1(b).

Respondent is an independent state agency. Respondent's governing commission consists of thirteen voting members, but only four of those members are appointed by the Governor. Ind. Code § 12-28-1-6(a). The remaining nine voting members are appointed by a majority of the commission members, *ibid.*, making the body self-sustaining. Two non-voting members are appointed by the state legislature from among its elected members. *Id.* § 12-28-1-6(c). Members of the commission serve fixed terms of three years. Ind. Code § 12-28-1-7(a). Under Indiana law, state officers appointed to fixed terms may only be removed "for cause and then only after a hearing on proper notice." Official Op. No. 40, 1954 Ind. Op. Att'y Gen. 146, 147 (1954). Thus, the members of respondent's governing commission may be removed from their positions by impeachment and trial by the state legislature for "crime, incapacity, or negligence," Ind. Const. art. VI, § 7; *see* Ind. Code §§ 5-8-1-1 to 5-8-1-18; or by conviction for a felony, *see* Ind. Code § 5-8-1-38.

Respondent may prosecute legal actions without involvement of the Indiana Attorney General. Respondent possesses the power to "sue and be sued" in its own name, hire outside counsel, and direct the exercise of its litigating authority. Ind. Code § 12-28-1-12(2), (4).

Further, respondent's finances are independent. The federal payments go "directly" to respondent. 42 U.S.C. § 15042(b). Respondent does not receive any appropriations from Indiana. *See* Ind. Prot. & Advocacy Servs., *Report to the Community: Priorities and Objectives for Fiscal Year 2011*, at 3-4 (Fall 2010), *available at* http://www.in.gov/ipas/files/0482-281_IMPACT-Fall10-WEB.pdf.

b. Separate from the Protection and Advocacy System, Indiana regulates the disclosure of "communications, proceedings, records, determinations, or deliberations" of a "peer review committee." Ind. Code § 34-30-15-1(f)(2). A "peer review committee" is defined as a committee that (1) is organized by a hospital or other medical facility; (2) at least half of whose members are individual professional health care providers or the governing board of a hospital; and (3) has the responsibility of evaluation of patient care rendered by professional health care providers, or evaluation of the merits of a complaint against a professional health care provider that includes a determination or recommendation concerning the complaint, and the complaint is based on the competence or professional conduct of an individual health care provider. *See id.* § 34-6-2-99(a).

While the records of a peer review committee are generally confidential under state law, there are numerous exceptions. Anything generated by the peer review committee may, upon approval by the health care facility's governing body, be reported to an independent patient safety agency. *Id.* § 34-30-15-1(e). And any "information" obtained by a peer review committee may be used by the hospital for "[l]egitimate internal business uses." *Id.* § 34-30-15-21(b). The "records" and "determinations" of a peer review committee may be disclosed to the disciplinary authority of the professional organization of which the professional health care provider is a member or the appropriate state board of registration and licensure that the peer review committee considers necessary for recommended disciplinary action. *Id.* § 34-30-15-8(a). A "determination" of a peer review committee of the hospital regarding an adverse event concerning patient care may be disclosed to the state department of health or another state agency "as part of the hospital's quality assessment and improvement program." *Id.* § 34-30-15-1(f). And any confidentiality provision may be waived in writing by the professional health care provider. *Id.* § 34-30-15-8(a).

B. Factual Background

This case originated in respondent's demand under PAIMI for various records of two persons with mental illness who died or were injured while in state custody. The first individual (described by the parties as Patient 1) died in another facility about 40 days after being admitted to Larue Memorial Hospital, a

psychiatric hospital operated by the Division of Mental Health and Addiction of the Indiana Family and Social Services Administration. Pet. App. 6a. Respondent was provided information by a staff person at Larue that led it to open an abuse and neglect investigation. Pet. App. 6a.

The second individual (Patient 2), who also resided at Larue, complained to respondent that hospital employees and police assaulted, battered, and attempted to murder him. Pet. App. 6a-7a. Patient 2 signed a release of information authorizing respondent to have access to his records. Pet. App. 7a.

In furtherance of its investigations, respondent requested the opportunity to inspect and copy four types of records, and was refused access to all four types. First, respondent requested access to Mortality Review Committee and Root Cause Analysis reports that resulted from Larue's internal investigation into the death of Patient 1. Pet. App. 6a. Petitioners refused to provide access to these reports because they were "peer review" records.

Respondent also requested a copy of Patient 1's "complete [medical] chart," Pet. App. 6a. Petitioners permitted respondent to inspect Patient 1's chart at Larue, Pet. App. 89a, but would not let respondent copy the chart, Pet. App. 6a. Petitioners stated that they would not release copies of the medical record without the consent of Patient 1's parents. Pet. App. 6a. They also refused to ask Patient 1's parents for consent. Petitioners explained that requesting

consent of the parents would "suggest to them that a state agency has found a smoking gun" in Patient 1's medical record, and would undo the "many hours" spent by the hospital social worker in "steering [the family] away from litigation." C.A. App. 40.

With regard to Patient 2, respondent sought a copy of the "investigation" Larue conducted in response to Patient 2's grievance. Pet. App. 7a. Petitioners provided a summary of the "investigation results," but did not provide copies of any underlying records. Pet. App. 7a. Respondent also requested the "incident report" created by Larue in response to the events surrounding Patient 2. Petitioners notified respondent that it would not provide a copy of the incident report "per organization policy." Pet. App. 91a; *see also* Pet. App. 91a. (stating that it was "not appropriate at any time [for respondent] to ask for a copy of the Incident Reports").

C. Proceedings Below

1. Respondent brought an action in district court seeking injunctive and declaratory relief to prevent petitioners from denying respondent access to the records at issue in violation of the PAIMI Act. Petitioners filed an answer in which they raised no affirmative defenses.

Following a stipulation of facts, the parties filed cross-motions for summary judgment. These motions joined issue on whether "peer review" records were exempt from the PAIMI Act's access requirement and whether respondent was required to get consent from

the parents of Patient 1 before accessing Patient 1's medical records. Petitioners did not argue that respondent's action was barred by the Eleventh Amendment, or question whether respondent possessed a federal cause of action to enforce the PAIMI Act.

The district court granted respondent's motion for summary judgment and denied petitioners' motion for summary judgment. Pet. App. 84a-105a. It held that PAIMI gave respondent a right to access "peer review" records, Pet. App. 93a-104a, and noted that petitioners had conceded in their brief that respondent had the right to access Patient 2's incident report, making summary judgment appropriate with respect to that report as well, Pet. App. 104a. The district court ordered petitioners to provide respondent access to those records but stayed its injunction pending disposition of the appeal. Pet. 7-8.

2. On appeal, petitioners renewed their statutory arguments that "peer review" records were exempt from the PAIMI Act's access requirement. Petitioners again conceded that Patient 2's incident report "fit[] the statutory definition of a 'record,'" Pet. C.A. Panel Br. 18, but claimed that the additional documents pertaining to Patient 2, described in their brief as "an incident panel review" and "the investigator's notes," *id.* at 3, 18, were not "records," *id.* at 18-20. Petitioners did not argue that respondent's action was barred by the Eleventh Amendment, or question whether respondent possessed a federal cause of action to enforce the PAIMI Act.

Following oral argument, the court of appeals ordered supplemental briefing on, inter alia, whether respondent had standing to assert a claim and whether PAIMI created rights enforceable in federal court by respondent. *See* C.A. Panel Order of Jan. 26, 2009. In response, petitioners argued that respondent lacked standing, either in its own right or on behalf of its clients, *see* C.A. Supp. Br. for Appellants at 1-3, and that PAIMI, as a funding statute, did not confer a private right of action on respondent to enforce respondent's right to access records. *Id.* at 3-4.

The court of appeals issued an opinion reversing the district court's grant of summary judgment. Pet. App. 74a-83a. It held that PAIMI did not create a private right of action to enforce directly the requirement that respondent receive access to "all records," and that respondent, as a state agency, could not enforce that requirement by bringing suit under 42 U.S.C. § 1983. Pet. App. 77a-80a. The court further held, without any briefing, that the Eleventh Amendment barred the suit as to the state agency defendant. As for the state official defendants, the court held that the *Ex parte Young* exception did not apply, because respondent's suit was not for solely prospective relief and also merely involved an intramural dispute within Indiana state government that did not belong in federal court. Pet. App. 80a-83a.

The en banc court granted rehearing, vacated that opinion, and ordered full briefing.

3. In their en banc brief, petitioners expressly abandoned their argument that respondent lacked standing. Petitioners also acknowledged that they were obliged to turn over the incident report for Patient 2. Six weeks later, on the day they served their en banc reply brief, petitioners gave respondent access to some documents regarding Patient 2, Pet. 9, but the particular incident report requested was never turned because petitioners could not locate it. And although they previously had argued that they did not have to turn over underlying investigative documents, petitioners claimed for the first time that no other "investigative reports were created with respect to Patient 2." Pet. App. 7a n.3; *see also* Pet. 9 n.2.

Instead, petitioners pressed only three arguments: that respondent's suit was barred by the Eleventh Amendment; that respondent lacked a federal cause of action to enforce the PAIMI Act; and that "peer review records" were exempt from the PAIMI Act's access requirement.

The en banc court affirmed the judgment of the district court against the state official petitioners and ordered the judgment vacated as to the state agency petitioner. Pet. App. 1a-37a.

The court noted that petitioners would normally have forfeited their Eleventh Amendment defense by failing to raise it prior to en banc rehearing. Pet. App. 10a. The court nonetheless elected to address the defense "[b]ecause the panel opened the door" by

sua sponte raising the immunity in its opinion. Pet. App. 10a. The court, however, rejected petitioners' claim of sovereign immunity as to the named state official defendants, holding that the suit fell squarely within the scope of *Ex parte Young*. Pet. App. 10a-18a.

The court then held that Congress, by providing that respondent "shall have access to all records" and "shall have the authority to pursue * * * legal and other appropriate remedies" had clearly conferred on respondent both a right to access records and a right of action to enforce that access directly through PAIMI. PAIMI was thus unlike the statutes at issue in cases such as *Gonzaga v. Doe*, 536 U.S. 273 (2002), which only imposed restrictions on federal funding recipients. Pet. App. 20a-28a. Additionally, in the absence of any administrative enforcement mechanism, the only other possible remedy for noncompliance by *Indiana* with PAIMI's requirements would be a funding cut-off for *respondent*, which the Court noted would be "perversely counterproductive." Pet. App. 28a-31a; *see also* Pet. App. 37a-48a (Posner, J., concurring) (writing separately "to emphasize practical considerations * * * favor[ing] recognition of IPAS's right to sue to obtain patient records").

On the merits of the proper interpretation of "all records," the court affirmed the judgment of the district court on the ground that it concurred with the four other courts of appeals to resolve the issue. Pet. App. 35a-37a.

Chief Judge Easterbrook dissented in part. He agreed with the majority that the Eleventh Amendment did not bar the action, reversing his earlier view. Pet. App. 58a. But he would have held that there was no federal right of action for respondent to access records. Pet. App. 48a-63a.

4. Petitioners sought a stay of the mandate pending the filing of a petition for writ of certiorari in this Court. That motion was denied by the court of appeals in a unanimous decision. Pet. App. 65a-71a.

The court noted that its Eleventh Amendment holding conflicted with the views of the Fourth Circuit and that "such a direct circuit split provides a reasonably promising possibility for certiorari review." Pet. App. 68a.[2]

But on the question of a private right of action "there is currently no direct circuit split." *Id.* at 69a. Indeed, the court held that its decision "appears to be the first one in which that specific question has been decided, though many other cases in circuit and district courts have assumed such a right under PAIMI." *Id.* at 68a.

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[2] A month after the court's order, this Court granted certiorari to review the Fourth Circuit's decision *See Virginia Office for Protection and Advocacy v. Stewart*, No. 09-529 (granted June 21, 2010).

Likewise, on the question of whether "peer review" records fall within the scope of PAIMI, the court noted that "all circuits are in agreement." Pet. App. 69a. With "all circuits in agreement this question does not appear to be promising for certiorari review" despite an "apparent outlier" decision by the New Hampshire Supreme Court. *Ibid.*

5. Petitioners applied to this Court for a stay of the mandate, which was denied by Justice Stevens in his capacity as Circuit Justice "for the reasons stated in [the Seventh Circuit's] order." Pet. App. 64a.

REASONS THE PETITION SHOULD BE DENIED

Petitioners seek review of an order compelling them to provide respondent access to certain documents. But petitioners provided copies of those documents to respondent on June 2, 2010, in compliance with the district court's order. Petitioners themselves stated in their unsuccessful application for a stay of that order that they now possess no remedy "as a practical matter" because "no court would be able to force anyone who has seen the [documents] to erase from their memories the information they have gleaned from the documents." Appl. for Stay of Mandate at 3, 9, No. 09-A1156 (May 27, 2010). Thus, even if this case is not technically moot (a question petitioners themselves stated was not free from doubt, *see id.* at 9), it is of little practical continuing significance.

In any event, the petition raises no issue warranting review. Although petitioners press an Eleventh Amendment question similar to that presented in *Virginia Office for Protection and Advocacy v. Stewart*, No. 09-529 (argued Dec. 1, 2010), there is no reason to hold this case pending disposition of that case. That is because petitioners waived their Eleventh Amendment claim by failing to timely raise it below and electing instead to litigate this action on the merits.

The other questions presented likewise do not warrant this Court's review. The Seventh Circuit, in a holding of first impression that is consistent with the results reached by all other courts, held that respondent has a private right of action under the Protection and Advocacy for Individuals with Mental Illness Act of 1986 to enforce its statutory right to access records. Further, consistent with each of the four courts of appeals that have addressed the issue, the Seventh Circuit properly interpreted the statutory phrase "all records" to contain no implicit exclusion for so-called "peer review" records, despite some subsequent legislative history to that effect.

I. CERTIORARI SHOULD BE DENIED ON THE FIRST QUESTION BECAUSE PETITIONERS WAIVED ANY ELEVENTH AMENDMENT IMMUNITY THEY POSSESSED

The Seventh Circuit en banc unanimously and correctly held that respondent, an independent state agency, can rely on the *Ex parte Young* doctrine to sue

state officials for prospective relief to enforce federal law without violating the Eleventh Amendment. This Court is addressing that very issue in *Virginia Office for Protection and Advocacy v. Stewart*, No. 09-529 (argued Dec. 1, 2010).

But there is no reason to hold this case pending disposition of that case. The Seventh Circuit need not have relied on *Ex parte Young* in this case because petitioners waived any immunity they possessed by failing to raise that immunity defense until their en banc brief and, instead, litigating the case on the merits.

Eleventh Amendment immunity is not an issue of subject-matter jurisdiction and thus need not be raised by a court *sua sponte*. *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998). Rather, state sovereign immunity is a "personal privilege." *Clark v. Barnard*, 108 U.S. 436, 447 (1883). It may be waived by litigation conduct, *see Lapides v. Board of Regents*, 535 U.S. 613, 619-620 (2002), including the failure to raise it in the district court, *see Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997); *cf. Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 623 (1838) ("[Personal jurisdiction] is a personal privilege which may be waived by appearance; and if advantage is to be taken of it, it must be by plea or some other mode at an early stage in the cause."). In so holding, this Court has been mindful of the inequity that results when a state official litigates on the merits in the district court, then argues on appeal that the district court never actually had jurisdiction. *Lapides*, 535

U.S. at 620-621; *cf. Schacht*, 524 U.S. at 394 (Kennedy, J., concurring).

This case is an excellent example of the waste of litigant and court resources flowing from adjudicating a belatedly-raised defense of immunity. The parties here spent considerable time compiling a factual record and briefing the merits in the district court, and the district court expended its resources to resolve the action on the merits at summary judgment. Petitioners' appeal used up further time, energy, and resources in the briefing and consideration of their merits-oriented statutory interpretation claims. Indeed, petitioners failed to brief the Eleventh Amendment issue until the case was heard en banc by the full Seventh Circuit, more than *three years* into the litigation.

Notwithstanding petitioners' failure to advance an Eleventh Amendment defense either before the district court or on appeal, the court of appeals panel chose to address the question. It should not have done so. For its part, the en banc Seventh Circuit, rather than holding the immunity defense forfeited, chose to address the defense in its own opinion solely because "the panel opened the door" by "rais[ing] the Eleventh Amendment issue." Pet. App. 10a. The Seventh Circuit ought not have condoned the waste

and unfairness resulting from petitioners' belated assertion of immunity. Nor should this Court.[3]

II. CERTIORARI SHOULD BE DENIED ON THE SECOND QUESTION PRESENTED BECAUSE THERE IS NO DIVISION IN THE COURTS AND THE COURT'S DECISION WAS CORRECT

1. Petitioners argue (Pet. 13-25) that this Court should grant review of the Seventh Circuit's holding

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[3] There is no dispute that the lower courts otherwise possessed Article III jurisdiction over this action Nonetheless, because petitioners at some points challenged respondent's Article III standing (while later conceding it), respondent notes the following. First, the failure to obtain records to which federal law arguably entitles respondent "constitutes a sufficiently distinct injury to provide standing to sue," petitioners' refusal to provide the records is the cause of that injury, and ordering petitioners to provide the records will redress that injury. *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989)

Second, the nature of respondent as an independent state agency suing other state officials does not alter that standing analysis because a sovereign can create agencies that are sufficiently independent that they possess the requisite adversity with other agencies even if, ultimately, the sovereign could moot the dispute by eliminating one of the agencies *See Lassen v Arizona ex rel Arizona Highway Dep't*, 385 U S. 458, 460 n.1 (1967) ("This action is in form and substance a controversy between two agencies of the State of Arizona * * * We have nonetheless concluded that this is a case with which we may properly deal. The Land Commissioner is apparently a substantially independent state officer, appointed for a term of years and removable only for cause."); *Udall v. FPC*, 387 U S. 428 (1967) (adjudicating challenge by Secretary of the Interior to Federal Power Commission decision licensing a hydroelectric dam)

that the PAIMI Act creates a federal cause of action for respondent to enforce its federal right to access records solely because, in petitioners' view, the Seventh Circuit got it wrong. Petitioners are, in fact, the ones who have it wrong. But that reason, standing alone, is no basis for granting certiorari.

The cause of action question is one of first impression in the courts of appeals, as the Seventh Circuit noted. Pet. App. 68a. That is not because the Protection and Advocacy Systems have not sued defendants in the past to enforce their right to access records under PAIMI and its predecessor, the Developmental Disabilities Act. To the contrary, Protection and Advocacy Systems have been doing so for several decades. *See, e.g., Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Board of Educ.*, 464 F.3d 229 (2d Cir. 2006) (Sotomayor, J.); *Disability Rights Wisconsin, Inc. v. State of Wisconsin Dep't of Pub. Instruction*, 463 F.3d 719 (7th Cir. 2006); *Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.); *Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10th Cir. 2003); *Pennsylvania Protection & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000) (Alito, J.); *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492 (11th Cir. 1996); *Mississippi Prot. & Advocacy Sys., Inc. v. Cotten*, 929 F.2d 1054 (5th Cir. 1991); *Ohio Legal Rights Serv. v. Buckeye Ranch,*

Inc., 365 F. Supp. 2d 877 (S.D. Ohio 2005); *Equip for Equality, Inc. v. Ingalls Memorial Hosp.*, 292 F. Supp. 2d 1086 (N.D. Ill. 2003); *Kentucky Prot. & Advocacy Div. v. Hall*, No. 3:01CV-538, 2001 WL 34792531 (W.D. Ky. Sept. 24, 2001); *Wisconsin Coalition for Advocacy, Inc. v. Czaplewski*, 131 F. Supp. 2d 1039 (E.D. Wis. 2001); *Trautz v. Weisman*, 846 F. Supp. 1160 (S.D.N.Y. 1994).

What is unusual about this case is that (at the prodding of the appellate panel) this is one of the first cases in which a defendant has challenged the existence of a federal cause of action for a Protection and Advocacy System. Pet. App. 31a-32a. The only other case, from a district court in Hawaii, reached the same result as the Seventh Circuit. *See Hawaii Disability Rights Center v. Cheung*, 513 F. Supp. 2d 1185 (D. Haw. 2007). Further percolation is appropriate to see how other courts react to this novel argument.

Further, petitioners conceded below that respondent can enforce its right to access records against state officials under a state cause of action. Pet. App. 17a-18a n.8. Thus, it is unclear why petitioners think this issue warrants further review, as they will not be avoiding any lawsuits by respondent even if they prevail on the merits of their cause-of-action argument.

2. In any event, the Seventh Circuit was correct. It examined (Pet. App. 19a-20a, 22a-27a) the cases cited by petitioners in the petition—*Alexander v. Sandoval*, 532 U.S. 275 (2001), *Gonzaga University*

v. Doe, 536 U.S. 273 (2002), and *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008) (per curiam)—and applied their holdings to this unique federal statute. "[C]lose attention to the language and structure of the PAIMI Act shows that Congress made sufficiently clear its intention to authorize protection and advocacy systems to sue directly under the PAIMI Act to enforce their rights to access to patient records against both public and private care-givers for the mentally ill." Pet. App. 34a.

As the court of appeals explained, the PAIMI Act does not (like a normal Spending Clause statute) require the State that receives federal funds under the Developmental Disabilities Act to do anything other than "designate[ ]" an entity to be its Protection and Advocacy System. Pet. App. 28a. Once the State does that, it is federal law that gives the Protection and Advocacy System its right to sue and the right to access records—no state implementation legislation is required. Pet. App. 21a, 28a. This reading is confirmed by Section 106(b) of PAIMI, which provides that "[i]f the laws of a State prohibit an eligible system from obtaining access to the records," then the effective date of the federal law is delayed until "the date such system is no longer subject to such prohibition" *or* May 23, 1986, "whichever occurs first." 42 U.S.C. § 10806(b)(2)(C). That provision "expressly preempts any state law prohibiting such access." Pet. App. 41a (Posner, J., concurring).

The court of appeals then inquired whether these federal rights were enforceable by a Protection and

Advocacy System. They found express authorization for suit in Section 105(a) of PAIMI. That provision provides that a System "shall have the authority to pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness." 42 U.S.C. § 10805(a)(1)(B). "A suit for access to patient records," the court of appeals found, "falls squarely within [that] statutory authority." Pet. App. 21a; *see also* Pet. App. 41a (Posner, J., concurring).

Further, the court of appeals held that federal fund termination, which is often an important remedy for assuring compliance with the goals of federal spending programs, had no utility under this statute. Pet. App. 29a-30a & n.13. That is because, normally, under a Spending Clause statute the funds that are terminated are those of the entity in non-compliance, such as a school district that discriminates or a state agency that does not permit someone to register to vote. But in this case, the entity that would lose the PAIMI money, the Protection and Advocacy System, is not at fault. It is trying to comply with federal law by accessing the records. It is state officials of state agencies responsible to the Governor that are violating federal law by not providing access to those records. Pet. App. 38a (Posner, J., concurring) (respondent "is a helpless bystander to the state's thumbing its nose at the statute under which [respondent] has received federal money"). Yet those agencies are not recipients of PAIMI money and thus a threat of fund termination would not encourage their compliance

with respondent's requests. Pet. App. 44a (Posner, J., concurring). "It is highly unlikely that Congress intended for such a funding cut-off to be the response to such violations by a state." Pet. App. 31a.[4]

III. CERTIORARI SHOULD BE DENIED ON THE THIRD QUESTION PRESENTED BECAUSE THE DECISION BELOW REGARDING THE APPLICATION OF PAIMI TO PEER REVIEW RECORDS IS CORRECT AND CONSISTENT WITH PRIOR DECISIONS IN THE LOWER COURTS

1. The question of whether the right of Protection and Advocacy Systems under the PAIMI Act to "have access to all records" extends to peer review records has generated no conflict in the federal courts.

The court below joined the four other federal courts of appeals to hold that Protection and Advocacy Systems' right to access records encompasses peer review records. *See Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.); *Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Center*

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[4] In addition, respondent argued that this suit could proceed under 42 U.S.C. § 1983 if brought by an official of respondent in his official capacity, and that it could be brought to enforce the Supremacy Clause under *Ex parte Young*. Pet. App. 31a. Those would remain alternative grounds for affirmance even if there was no cause of action directly under the PAIMI Act.

for Legal Advocacy v. Hammons, 323 F.3d 1262 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000) (Alito, J.).

Petitioners argue (Pet. 27-28) that all these decisions conflict with an earlier decision of the New Hampshire Supreme Court. *See Disabilities Rights Ctr., Inc. v. Commissioner*, 732 A.2d 1021 (N.H. 1999).

As the Second Circuit pointed out, *see Protection & Advocacy*, 448 F.3d at 126, the New Hampshire court did not address the relevant statutory language. Instead, it focused on a federal HHS regulation stating that the access right was not intended to preempt state laws preventing access to peer review records. Unlike the federal courts of appeals, the state court did not consider whether that regulation could be reconciled with the language of the PAIMI Act itself, apparently because that argument was not raised. *See Disabilities Rights Ctr.*, 732 A.2d at 1023-1024.

The federal courts of appeals deciding this question have all subsequently concluded that the regulation was inconsistent with the statute. And HHS is currently considering regulatory revisions that would eliminate the provision relied on by the state court. *See* 73 Fed. Reg. 19,708, 19,708-19,709, 19,716, 19,731-19,732 (2008). This event further suggests that any disagreement with the state court is of no continuing significance.

2. The federal courts of appeals have correctly interpreted the statute. Section 105 of PAIMI mandates

that respondent shall "have access to *all* records of * * * any individual." 42 U.S.C. § 10805(a)(4) (emphasis added). Section 106 of PAIMI defines the term "records" to include "reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury * * * describ[ing] incidents of abuse, neglect, and injury * * * and the steps taken to investigate such incidents." *Id.* § 10806(b)(3).

Section 106 of PAIMI also emphasizes that this access right applies notwithstanding "the laws of a State" that would "prohibit an eligible system from obtaining access to the records of individuals with mental illness in accordance with section 10805(a)(4) of this title and this section." *Id.* § 10806(b)(2)(C). Thus, the plain language of PAIMI gives Protection and Advocacy Systems such as respondent the right to "all" reports created by hospital committees evaluating the treatment of their patients.

3. Petitioners seek to evade the plain language (Pet. 27) by recourse to legislative history from a 1991 committee report. But the provisions governing records were enacted in 1986 and 1988. *See* PAIMI Act, Pub. L. No. 99-319, §§ 105, 106, 100 Stat. 478, 480 (1986) (initial enactment of statute); PAIMI Amendments Act of 1988, Pub. L. No. 100-509, § 6(b), 102 Stat. 2543, 2544 (1988) (adding definition of "records"). None of the language was amended in 1991. A committee report describing what an earlier Congress did is entitled to virtually no weight. *See*

Doe v. Chao, 540 U.S. 614, 626-627 (2004). As the Third Circuit said in *Pennsylvania Protection & Advocacy*, if Congress wanted to exclude state peer review records, "it needed to enact different statutory language. It could not achieve that result, in the face of the statutory language it enacted, simply by inserting a passage in a committee report" after the fact. 228 F.3d at 428.

Petitioners fare no better with their claim (Pet. 30) that the statute should be read to implicitly exclude peer review records on public policy grounds. Privileges that protect relevant evidence from discovery are disfavored. *See University of Pennsylvania v. EEOC*, 493 U.S. 182, 188-195 (1990) (refusing to recognize academic peer review privilege). Federal courts have refused to recognize a federal medical peer review evidentiary privilege, even when such records would be privileged in state courts under state law. *See, e.g.*, *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007), cert. denied, 552 U.S. 1131 (2008); *Virmani v. Novant Health Inc.*, 259 F.3d 284 (4th Cir. 2001); *Memorial Hosp. v. Shadur*, 664 F.2d 1058 (7th Cir. 1981) (per curiam). The decision below, which permits Protection and Advocacy Systems access to peer review documents in order to protect persons in state-run institutions from abuse and neglect, is consistent with public policy as reflected in this unbroken line of decisions.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 10-131

IN THE

Supreme Court of the United States

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION; MICHAEL A. GARGANO, in his official capacity as Secretary of the Indiana Family and Social Services Administration; GINA ECKART, in her official capacity as Director of the Division of Mental Health and Addiction; LARRY LISAK, in his official capacity as Superintendent of Larue Carter Memorial Hospital,

Petitioners,

v.

INDIANA PROTECTION AND ADVOCACY SERVICES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF THE PETITION

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REPLY IN SUPPORT OF THE PETITION

Respondent's suggestion that this case has no continuing importance because the state already disclosed the documents at issue, Brief in Opposition at 14, is plainly wrong and also sadly disingenuous. First, the state officials reserved the right to take back the documents should they prevail here. Petition at 10. Second, IPAS opposed Petitioners' request for a stay because the "tools available to a district court, including the ability to order all copies of the documents in IPAS's possession destroyed, could [ ] substantially cure any injury caused by the disclosure to IPAS." Opp'n to Appellants' Mot. to Stay Mandate at 4. Third, any ruling from the Court on the matters raised here will have ongoing practical significance for the administration of state agencies as well as other targets of IPAS investigations. A decision on the merits of the cause of action and peer review issues will impact Congress and the Department of Health and Human Services as well. Accordingly, this case remains important to several state and federal constituencies, and for that reason should be granted.

What is more, IPAS concedes that this case presents the identical sovereign immunity issue as the Virginia Office of Protection and Advocacy case currently pending before the Court, *Virginia v. Reinhard*, 568 F.3d 110 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3737 (U.S. June 22, 2010) (No. 09-529) (oral argument heard Dec. 1, 2010). *See* Brief in Opposition at 16 ("This Court is addressing that very

issue in" *Reinhard*). Because the issue is the same, the outcome of *Reinhard* should control the result of the sovereign immunity question presented here. Thus, the Court should at the very least hold this case pending its decision in *Reinhard*.

I. The Seventh Circuit Chose to Address Indiana's Sovereign Immunity Claim and it is Therefore a Live Issue

IPAS's argument that the state has waived its Eleventh Amendment argument is simply wrong. After a request for supplemental briefing by the Seventh Circuit panel, the state raised sovereign immunity issues. *See* State's Supplemental Br. at 4. Further, after the petition for rehearing *en banc* was granted, the parties were ordered to brief the case anew. App. 72a-73a. In the *en banc* briefs—the controlling appellate briefs—the Eleventh Amendment issue was fully engaged by both parties. State En Banc Br. at 13-25; IPAS En Banc Br. at 24-33. And, of course, the *en banc* court below squarely addressed the issue. App. 9a-18a.

The state could have raised its Eleventh Amendment defense for the first time even in this Court: "[t]he Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Ford Motor Co. v. Dep't of Treas. of Ind.*, 323 U.S. 459, 467 (1945), *overruled in part on*

other grounds[1] *by Lapides v. Bd. of Regents of the Univ. Sys. of Georgia*, 535 U.S. 613, 623 (2002); *see also Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975) ("the failure of the State to raise the defense of sovereign immunity in the District Court would not have barred Iowa from raising that issue in this Court").

More specifically, "[t]he Court has said the Eleventh Amendment bar may be asserted for the first time on appeal, so a State which is sued in federal court does not waive the Eleventh Amendment simply by appearing and defending on the merits." *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 393-94 (1998) (Kennedy, J. concurring) (citing *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683, n.18 (1982) (plurality opinion); *Calderon v. Ashmus*, 523 U.S. 740, 745, n.2 (1998); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99, n.8 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974)).

Regardless, the Seventh Circuit panel raised the sovereign immunity issue, as it was entitled to do, and the *en banc* court correctly found that "because the panel opened the door, [it needed to] address the defense." App. 10a. This effectively negates any suggestion of waiver. The Seventh Circuit decided the issue, the result impairs the state's immunity

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[1] In *Lapides*, the Court's finding of waiver was "limit[ed] . . . to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." 535 U.S. at 617. This concern does not apply where, as here, there has been no removal of state law claims to federal court.

going forward, and, therefore, the issue is alive and appealable.

IPAS nonetheless claims that the Seventh Circuit should not have addressed the Eleventh Amendment defense in its *en banc* opinion even though the panel based its decision on that issue. Brief in Opposition at 17. If the *en banc* court had ignored the issue, however, there would have been no circuit conflict prompting the Court to grant *certiorari* in *Reinhard*. IPAS's argument, taken to its logical conclusion, implies that the Court should (1) grant, vacate and remand this case with instructions that the Seventh Circuit remove the Eleventh Amendment holding from its *en banc* opinion; and (2) dismiss the VOPA case as improvidently granted in light of a lack of circuit conflict.

It seems unlikely that IPAS would actually desire this result, so its waiver argument cannot be given credence. Accordingly the Court should at the very least hold this case pending resolution of *Reinhard*.

II. The Seventh Circuit's Ruling on the Cause of Action Issue is in Tension with Supreme Court Precedent

IPAS stresses that whether PAIMI creates a cause of action is "an issue of first impression." Brief in Opposition at 19. Yet four other circuits have granted relief to P&A systems as if a PAIMI cause of action exists. *See, e.g., Prot. & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006); *Pennsylvania*

Prot. & Advocacy, Inc. v. Houstoun, 228 F.3d 423, 428 (3d Cir. 2000); *Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Ctr. for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1272 (10th Cir. 2003). None of these cases even cites *Gonzaga* or otherwise explains where they found a PAIMI cause of action, yet they permitted one *sub silentio*. The Court should not wait on the unlikely event that these courts will reverse course before taking up this issue.

The decision below and the tacit approval of a PAIMI cause of action elsewhere is especially troubling because this Court has so emphatically provided clear guidance on when and how Spending Clause statutes create causes of action. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *Davis v. Passman*, 442 U.S. 228, 239 (1979). Whether Congress intended to create a cause of action "'is definitively answered in the negative' where 'a statute by its terms grants no private rights to any identifiable class.'" *Gonzaga*, 536 U.S. at 283-84 (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979)). More recently, this Court reemphasized that causes of action must be clearly set forth by Congress, rejecting as it did the Sixth Circuit's understanding that state-level administrative processes can imply rights of action to enforce federal programs. *See Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008) (per curiam).

Here, "[t]he statutes in question do not confer rights on the plaintiff." App. 49a (Easterbrook, C.J.,

dissenting); *see also* Petition at 13-25. The *en banc* court's creation of a cause of action shows that the Court's repeated doctrinal instructions are not being carried out. *See* App. 49a (Easterbrook, C.J., dissenting). Given the nature of the doctrine at stake, which requires clarity on the part of Congress before the Court finds a right of action, and given that so many appeals courts have already assumed this issue away, this is not a case where the Court is likely to gain any benefit from further percolation and insight from lower courts. Either Congress unambiguously provided a cause of action under PAIMI or it did not.

Furthermore, IPAS suggests that it would somehow be unfair for PAIMI to be treated as a typical Spending Clause statute because cancellation of the federal grant would harm IPAS and its particular mission rather than other state officials and their particular mission. Brief in Opposition at 22. But it is the need to hold accountable the grant-receiving state, not a particular agency or official of that state, that makes grant revocation an appropriate remedy. If Indiana loses the grant that funds IPAS, *Indiana* is held accountable, and IPAS's funding is part of that.

Ultimately, like its (and VOPA's) arguments with regard to the sovereign immunity issue, IPAS's position on this "fairness" issue ignores the fact that IPAS *is* the state. Even if a state-agency protection and advocacy system has a sufficiently justiciable stake to satisfy Article III (and some members of the Court raised doubts about this at the oral argument

in *Reinhard*), it is wrong to conceptualize IPAS as having some broader equitable interest in federal funding beyond its role as an appendage of the state.

Regardless, it is irrelevant to the cause of action issue whether judges may think it unfair to defund IPAS in response to the failings of another state agency's officials. The existence of remedies "depend[s] on the statutory text and structure, not on judges' views about how much enforcement, and by whom, is optimal." App. at 49a (Easterbrook, C.J., dissenting).

PAIMI provides no cause of action for this lawsuit. The Court should grant this case to emphasize the restrictions imposed on lower courts by its right-of-action precedents.[2]

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[2] IPAS suggests that it could also proceed under 42 U.S.C. § 1983. Brief in Opposition at 23 n.4. In the *en banc* proceedings, however, IPAS conceded that, as a state agency, it could not bring suit under Section 1983. It even asked for a remand so as to amend its complaint to add its Executive Director in his official capacity as a plaintiff. *See* IPAS En Banc Br. at 50. IPAS thus recognized that because of its pleading choices, Section 1983 was not the "alternative grounds for affirmance" that it now claims. Brief in Opposition at 23 n.4. Regardless, the IPAS Executive Director is no more a "person" under Section 1983 than is IPAS, as the rationale for allowing Section 1983 suits for injunctive relief to proceed *against* state officials does not apply to such suits *by* state officials—the law of Section 1983 cannot bear any more fictions than it already has. *See* State En Banc Reply Br. at 18. Finally, Section 1983 "merely provides a mechanism for enforcing individual rights 'secured' elsewhere," and if PAIMI does not secure rights justifying a cause of action, *see supra* Part II, any properly raised Section 1983 claim would also fail.

III. In Conflict with the Decision Below, Both HHS and a State Supreme Court have Concluded that Confidential Peer Review Documents Are Not Covered by PAIMI

The Department of Health and Human Services has promulgated a rule interpreting PAIMI to exclude peer review records, the confidentiality of which is otherwise protected by state law. *See* 42 C.F.R. § 51.41(c)(4). Five courts of appeals, including the Seventh Circuit, have now found that the HHS rule is inconsistent with PAIMI. *See* Brief in Opposition at 23-24. The New Hampshire Supreme Court, however, has upheld and enforced HHS's regulation concerning peer review records. *Disabilities Rights Ctr., Inc. v. Comm'r, New Hampshire Dep't of Corrections*, 732 A.2d 1021, 1024 (N.H. 1999).

HHS is in the process of promulgating a new rule, 73 Fed. Reg. 19,708, 19,715, (Apr. 10, 2008), but that process began more than two years ago, and there is no reason to believe that a final revision will be issued soon. The conflict among courts regarding the extant regulation continues to cause confusion for doctors, administrators and agency officials who must try to apply the law. The Court needs to resolve the peer-review documents issue for the sake of consistency and finality.

Gonzaga, 536 U.S. at 285; *see also* State En Banc Reply Br. at 17-19.

CONCLUSION

The petition should be granted or at the very least held pending the Court's decision in *Reinhard*.

Respectfully Submitted,

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